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Governing disputed maritime areas

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Abstract

Following the adoption of the 1982 UN Convention on Law of the Sea (the LOSC), coastal states were able to claim national jurisdiction over maritime areas adjacent to their coasts up to 200 nautical miles, or more in some circumstances. The expansion of the spatial extent of maritime areas that coastal states could claim, together with other geographical and physical factors, such as the proximity of coasts and the existence of islands, brought many maritime areas under concurrent and overlapping claims by two or more opposite or adjacent neighbouring coastal states. However, overlapping maritime claims may also exist due to competing claims of sovereignty over land and disputes over the status of maritime features, which dictate the entitlements of such features to maritime zones, or disputes over claims to sovereignty over such features. All such maritime areas of contestation, whether arising due to undelimited boundaries or sovereignty disputes over land, are referred to as disputed maritime areas. Given the technical and political difficulties surrounding maritime boundary delimitation and sovereignty disputes, negotiations do not always resolve the differences between the parties right away. In some circumstances, maritime boundary delimitation can take decades to agree upon, in others possibility of an agreement over maritime boundaries seems distant due to the existence of disputed claims to sovereignty over land, such as islands or other maritime features. Pending agreement, disputed maritime areas are characterised by competing claims to sovereignty, sovereign rights, and jurisdiction, depending on the maritime zone, complicating the exercise of coastal state competencies. In practice, disputes over maritime areas can also regularly escalate leading to military stand-offs and even acts of violence. This reality, begs the question: what is the normative and institutional framework for managing disputed maritime areas?

This thesis explores this question through the concept of ‘governance’, which is influenced by the literature on ‘ocean governance.’ The conceptual framework of governance allows the thesis to address and account for the relationship and interaction between principles rules and institutions in the management of disputed maritime areas. Whilst rules dictate what is lawful or unlawful behaviour in disputed maritime areas under the international legal framework, an exclusively bilateral legal analysis of disputed maritime areas presents only a limited picture of how disputes are

or can be, managed in practice. A governance perspective on disputed maritime areas is valuable because it helps reframe the problem and consider disputed maritime areas within the broader framework in which they are situated. This thesis aims to demonstrate that managing disputed maritime areas is a process that takes place at multiple levels, based on the normative framework (principles and rules), with the inclusion of institutions and other processes. Importantly, different processes are not mutually exclusive, they should rather be seen as complementary to each other.

Lay Summary

Disputed maritime areas are maritime spaces where coastal states have overlaps with other coastal state in areas under their authority. This overlap of authority creates problems because in such maritime spaces there is a problem of vagueness and uncertainty in relation to who is entitled to exercise rights and authority in relation to, for example, fisheries management and/or protection and preservation of the marine environment. Given this uncertainty and examples from practice whereby states engage in dangerous military confrontations over maritime areas, this thesis explores the following question: how to live with disputed maritime areas?

This thesis argues that there are principles that guide the behaviour of states, such as peaceful resolution of disputes, cooperation, and mutual restraint etc. There are also specific rules that the UN Convention on Law of the Sea (the LOSC) dictate the conduct of states in disputed maritime areas. However, these rules and principles do not exist in isolation nor do disputed maritime areas. There are also institutions that assist states in managing their disputed maritime areas such as fisheries management organisations and also judicial institutions. In sum, this thesis aims to show that there are a number of processes that contribute to peaceful and orderly management of disputed maritime areas.

Table of Contents

Chapter I: Introduction

1 Introduction

With the expansion of the maritime areas that coastal states can claim, we have witnessed an increase in the number of overlapping claims of states in maritime areas. Over time, some of these boundary disputes have been settled, mostly by agreement between states and via delimitation by courts and tribunals. However, some disputes remain unresolved, exacerbating tensions and conflicts between states. The Aegean Sea dispute between Turkey and Greece is a notable example. This thesis is concerned with such disputed maritime areas and is motivated by exploring "how to live with unresolved issues [which] are of no less importance than the rules on how to resolve them".[1]

This introductory chapter provides the necessary background for this thesis. It begins by defining and explaining the term 'disputed maritime areas' and goes on to explain the nature and challenges of disputed maritime areas. This chapter then situates the thesis within the existing literature and explains the conceptual framework of 'governance' employed and methodology of this thesis. The chapter concludes by briefly outlining the structure of the thesis.

2 What is a disputed maritime area?

There are a considerable number of unresolved maritime boundary disputes between states with 'adjacent' or 'opposite' coasts over overlapping claims to sovereignty, sovereign rights, and jurisdiction, depending on the specific maritime zone, i.e., territorial sea, exclusive economic zone (EEZ), or the continental shelf. Alongside geographical factors, such as the positioning of coasts and the existence of islands, the extension of maritime jurisdiction up to 200 nautical miles (nm), or more in some circumstances, brought many maritime areas under overlapping claims of states.[2]

[1] Separate and Dissenting Opinion of Judge *ad hoc* Oxman in *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives),* Preliminary Objections, Judgment, ITLOS Reports 2020-2021, p. 17, para 13 (hereinafter '*Mauritius v. Maldives*').
[2] In some circumstances states are also able to delineate limits of their extended continental shelves.

There are also the so-called 'mixed disputes' – those involving both territorial and maritime aspects.

For the purposes of this thesis, such maritime areas where two or more states have overlapping entitlements, or claims, are defined as disputed maritime areas. Disputed maritime areas can result from: (a) disagreements over how to delimit areas of overlapping entitlements and/or claims; (b) over the status of maritime features and entitlements of such features to maritime zones and (c) disputes over land sovereignty which projects into competing claims over the appertaining maritime area. The claims of coastal states to maritime areas are generally made under the 1982 United Nations Convention on Law of the Sea (the LOSC)[3]. For instance, all coastal states are entitled to a territorial sea, an exclusive economic zone and a continental shelf, as established in relevant provisions of the LOSC.[4] When these entitlements overlap, international law accepts that there exists two equally and potentially valid legal titles to the maritime area in question[5], in which case states should make "reasonable sacrifice such as would make possible a division of the area of overlap".[6]

While many disputes over maritime boundaries have resulted in agreements based on the LOSC, others have proved harder. The delimitation of disputed maritime areas proves particularly difficult in the context of 'mixed disputes', as they involve sensitive sovereignty issues.[7] Although international law provides for peaceful settlement of disputes, as enshrined in the UN Charter[8], some of the enduring disputed maritime areas are unlikely to be settled between the competing claimant states for various reasons.[9] These include political, economic and historic reasons which make it difficult

[3] United Nations Convention on Law of the Sea (adopted 10 December 1982, entry into force 16 November 1996) 1883 *UNTS* 397 (hereinafter 'the LOSC').
[4] Articles 2, 55 and 76 of the LOSC. Rocks are only entitled to a territorial sea, but not to exclusive economic zone or continental shelf, see article 121(3) of the LOSC.
[5] For the elaboration of this point see the discussion below under section 3.
[6] Prosper Weil, *The Law of Maritime Delimitation-Reflections* (Cambridge Grotius Publications Ltd 1989) 91-92.
[7] Examples include dispute between Japan and Republic of Korea over Dok-do/Takeshima, Japan, and China over Senkaku/Diaoyu Islands.
[8] Article 2(3) of the Charter of the United Nations (hereinafter 'UN Charter').
[9] For a brief discussion of diverse factors that can influence maritime boundary negotiations and the chances of a settlement, see Michael Byers and Andreas Østhagen, 'Settling Maritime Boundaries: Why Some Countries Find It Easy, and Others Do Not' in Dirk Werle and others (eds), *The Future of Ocean Governance and Capacity Development: Essays in honor of Elisabeth Mann Borgese* (Brill | Nijhoff 2018) 162-168.

for states to find a compromise. For example, disputes over maritime areas are sometimes turned into, on purpose, a matter of national pride and a symbol of national struggle against an enemy who tries to "cheat the nation out of what is ours".[10] Such a political atmosphere makes it difficult for states or policymakers to later admit that they are negotiating "what rightly belongs to the nation".[11]

In addition to these non-legal factors, the LOSC accords coastal states the optional right to exempt 'sea boundary delimitations' from the purview of the compulsory dispute settlement mechanism envisaged in the Convention.[12] Many states have exercised this right – there are 43 such declarations out of 168 parties to the LOSC.[13] State Parties have made declarations removing maritime boundary delimitation disputes from the purview of compulsory procedures under Part XV, either completely, or to varying degrees. Some notable patterns are as follows: (a) removing the jurisdiction of all section 2 fora (exercised by 37 States); (b) only removing the jurisdiction of a particular forum, such as Annex VII tribunals (exercised by three States) or ICJ (exercised by two States); (c) explicit acceptance of only one fora's jurisdiction (Nicaragua only accepts ICJ's jurisdiction). There are also some states who have not become a party to the LOSC because of pending maritime disputes and disagreements over the provisions of the LOSC in relation to maritime zones, such as Turkey.[14]

For these reasons, some of the existing disputes over maritime areas are likely to remain unresolved for the foreseeable future. As will be further explored below, disputed maritime areas are characterised by uncertainty over jurisdiction and competing efforts to assert claims, both of which are risks for maritime security. Maritime security is an elusive concept and may have different meanings in different

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[10] Andreas Østhagen, 'Maritime Boundary Disputes: What Are They and Why Do They Matter?' (2020) 120 Marine Policy 104118, 5–6.
[11] Ibid.
[12] Article 298(1)(a)(i) of the LOSC. For further discussion see Chapter VI.
[13] Number is correct as of 1 July 2021. The declarations made are available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.
[14] Turkey has voiced over the years its disagreement with the regime of islands, i.e., article 121, under the LOSC especially in relation to any potential application of those provisions to the Greek islands in the Aegean Sea.

contexts. This thesis adopts Klein's understanding of maritime security: "the protection of a state's land and maritime territory, infrastructure, economy, environment and society from certain harmful acts occurring at sea".[15] While disputed maritime areas raises issues of what may be considered traditional maritime security for a state, such as military security, particularly "in terms of asserting and defending state sovereignty as well as exerting power over other states or areas", exemplified in various disputes including South China Sea disputes.[16] Maritime security also includes threats to environmental and economic interests, which are characterised as issues of 'soft security'.[17] Ensuring maritime security, both hard and soft, is challenged by the existence of disputed maritime areas. Maritime delimitation is arguably a critical component of, or underpins, maritime security operations as it clarifies the scope of each state's jurisdiction. Thus, the uncertainty of jurisdiction in disputed maritime areas compromises maritime security efforts. For example, uncertainty over jurisdiction is a challenge for security actors, including coast guards, who dispute and assert simultaneously a right to exercise jurisdiction, and this both compromises their ability to respond to security challenges and creates insecurity in and of itself due to propensity to cause conflict. The lack of jurisdictional clarity also establishes a gap whereby illegal activities may flourish. It is these challenges associated with disputed maritime areas that raises and motivates this thesis to address the following question: pending any potential future settlement, what is the normative and institutional framework for managing disputed maritime areas? Answering this question requires, first, an understanding of the nature of disputed maritime areas and the challenges they present.

3 The nature of disputed maritime areas

To illustrate the nature of disputed maritime areas, this section touches on two issues: that of rights and the status of natural resources. The issue of rights speaks to the nature and challenges of disputed maritime areas. First, the overlapping entitlements in disputed maritime areas create uncertainty concerning the extent of the coastal state's sovereign rights. This uncertainty about coastal state rights drives disputing

[15] Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 11.
[16] Ibid, 6.
[17] Klein (n 15) 7.

states' actions based on and looking out for their national interests. However, such one-sided or unilateral actions may easily result in problems/challenges to be navigated, such as possible military confrontations and frictions over practices concerning living or non-living resources. The issue or status of natural resources also speaks to the nature and challenges of disputed maritime areas. Disputing states often regard the marine environment and natural resources therein as under their 'exclusive' jurisdiction and belonging solely to them without having regard to the rights and the entitlements of the other disputing state(s) and the interests of the international community. The following sub-sections consider the status of rights and natural resources in disputed maritime areas.

3.1 The status of sovereign rights in disputed maritime areas – Are they exclusive? Are they declared or constituted?

The case of *Ghana v. Côte d'Ivoire*[18] before the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) provides a useful illustration of how states perceive disputed maritime areas, and such perceptions help demonstrate the nature of disputed maritime areas. In this case, Côte d'Ivoire's counter-memorial referred to the disputed maritime areas as the 'Ivorian maritime area' and submitted that activities undertaken by Ghana therein constitute a violation of "the exclusive sovereign rights of Côte d'Ivoire on its continental shelf".[19] Such remarks are not uncommon among disputing states. Often each state claims that they have 'exclusive' sovereign rights in the maritime area in question and verbally, or otherwise, protests the 'illegal' activities of the other disputing state. Is it true that coastal states have 'exclusive' sovereign rights in an area in which they share overlapping entitlements with another coastal state? This argument of exclusive sovereign rights, in a known disputed maritime area, is an overstretch.

It is true, that the nature of the rights of coastal states in respect of the continental shelf off their coasts are inherent meaning that the rights do not depend on

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[18] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana v. Côte d'Ivoire),* Judgment, ITLOS Reports 2017, p. 4 (hereinafter '*Ghana v. Côte d'Ivoire*').

[19] Counter-Memorial of the Republic of Côte d'Ivoire, 4 April 2016, p. 251, available at the ITLOS website: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/pleadings/Counter_Memorial_final_Vol.I_Eng_TR.pdf

proclamation or occupation.[20] The rights are also exclusive, meaning that "if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal state".[21] In other words, as the ICJ proclaimed in 1969 in the *North Sea Continental Shelf*[22] these sovereign rights exist *ipso facto* and *ab initio*.[23] It was also further explained by the ICJ that in order to exercise rights over the continental shelf "no special legal process has to be gone through, nor have any special legal acts to be performed" and that "its [sovereign rights] existence can be declared but does not need to be constituted".[24]

Referring to this jurisprudence by the ICJ, Côte d'Ivoire argued, "a logical consequence" of the "inherence of sovereign rights" is that "the exclusive rights to the continental shelf can be violated even when the delimitation line is still to be defined".[25] According to Côte d'Ivoire "delimitation judgment does not therefore create sovereign rights; it merely clarifies their geographic scope with the force of *res judicata*" and "that Côte d'Ivoire and Ghana will know the precise limit of their sovereign rights" by the virtue of the delimitation of their maritime boundary by the Special Chamber.[26] Côte d'Ivoire's litigation strategy here was to get the Special Chamber to rule in favour of its proposed boundary (which the Chamber did not) and to convince the Chamber to hold Ghana internationally responsible *ex post facto* (after delimitation) for its activities in the disputed maritime area, which took place pending delimitation, violating the 'exclusive' sovereign rights of Côte d'Ivoire (which the Chamber did not).

Côte d'Ivoire's claim that pending the settlement of the dispute over maritime areas states "have an entitlement to the relevant continental shelf on the basis of their relevant coasts", has merit – as this is an inherent right of the coastal state also

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[20] Article 77(3) of the LOSC; *Ghana v. Côte d'Ivoire* (Judgment), para 590.
[21] Article 77 (2) of the LOSC.
[22] *North Sea Continental Shelf cases (the Federal Republic of Germany v Denmark and the Netherlands),* Judgment, 20 February 1969, ICJ Reports 1969, p. 3 (hereinafter '*North Sea Continental Shelf cases*').
[23] *North Sea Continental Shelf cases,* para 19.
[24] Ibid.
[25] *Ghana v. Côte d'Ivoire* (Judgment), para 564.
[26] Ibid, 565.

confirmed by the Special Chamber.[27] However, it is not possible to claim that sovereign rights are 'exclusive' in the context of disputed maritime areas. This is because in disputed maritime areas, pending settlement, there are two equal and potentially valid overlapping legal entitlements. This state of affairs is explicitly acknowledged in the Special Chamber's constitutive approach to its judgment on the delimitation of the maritime boundary between the parties.[28] According to the Special Chamber, judgment on delimitation "gives one entitlement priority over the other" and "establishes which part of the continental shelf under dispute appertains to which of the claiming States".[29] In this case, this was an acknowledgement by the Chamber that both Ghana and Côte d'Ivoire had valid legal entitlements to the area in question before the judgment on delimitation by the Special Chamber. It is only after the delimitation judgment, which 'constitutes' the boundary line parting the maritime areas of the parties, that the full extent of entitlements, and hence, 'exclusive' sovereign rights become clear. This is the reason why the Chamber rejected the Ivorian argument that 'exclusive' sovereign rights can be violated in a disputed maritime area. According to the Special Chamber, so long as the parties make 'good faith' claims to the area concerned, maritime activities undertaken by State A in a disputed maritime area before the attribution of the area to State B by the judgment, cannot be considered a violation of the sovereign rights of State B.[30] What this meant for the case before the Special Chamber, as reiterated, is that even if the activities of Ghana took place in areas attributed to Côte d'Ivoire by the Judgment, Ghana could not be deemed to have violated the sovereign rights of Côte d'Ivoire when they took place prior to the Judgment.[31]

At this point, it is worth reflecting on some of the criticisms in the literature about the approach of the Special Chamber based on the 'constitutive approach' taken to delimitation and sovereign rights.[32] Youri Van Logchem argues that the constitutive

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[27] *Ghana v. Côte d'Ivoire* (Judgment), para 591.
[28] Bin Zhao, 'The Curious Case of Ghana/Côte d'Ivoire: A Consistent Approach to Hydrocarbon Activities in the Disputed Area?' (Singapore) 10 *Asian Journal of International Law* 94, 109.
[29] *Ghana v. Côte d'Ivoire* (Judgment), para 591.
[30] Ibid, para 592.
[31] *Ghana v. Côte d'Ivoire* (Judgment), para 594.
[32] Youri Van Logchem, 'The Rights and Obligations of States in Disputed Maritime Areas: What Lessons Can Be Learned from the Maritime Boundary Dispute between Ghana and Cote d'Ivoire' [2019] Vanderbilt Journal of Transnational Law 121.

approach taken by the Special Chamber is unconvincing and parted with previous jurisprudence where it was held that delimitation is declarative of pre-existing rights, i.e. *North Sea Continental Shelf*.[33] The ICJ in the *North Sea Continental Shelf,* held that "[d]elimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area"[34] and "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land".[35] While the ICJ's decision does not explicitly state that delimitation is declarative of sovereign rights, it is implicit in the judgment.

However, the Special Chamber's judgment can be read in a way that it does not part with the jurisprudence of the ICJ. First, the Chamber indeed recognised that sovereign rights are inherent – i.e., that coastal states have an entitlement without the need to declare their rights. The Chamber did not suggest that delimitation is constitutive of or creates rights. Indeed, it was made explicit that "[t]he Special Chamber agrees with the statements of the two Parties that the sovereign rights which coastal States enjoy in respect of the continental shelves off their coasts are exclusive in nature and that coastal States have an entitlement to the continental shelves concerned without the need to make a relevant declaration".[36] What the Special Chamber qualified as not being "merely declaratory" and also "has a constitutive nature" is the decision on the boundary line.[37] The judgment on the delimitation of the maritime boundary is constitutive because there was no pre-existing boundary to speak of, and that was precisely what the parties asked the Chamber to do in this case: draw the maritime boundary delimiting areas belonging to each party. It is the maritime boundary that the delimitation judgment constitutes, which clarifies (and 'declares') the extent of the pre-existing sovereign rights.

[33] Ibid, 160 and 174.
[34] *North Sea Continental Shelf cases*, para 18.
[35] Ibid, para 19.
[36] *Ghana v. Côte d'Ivoire* (Judgment), para 590.
[37] Ibid, para 591.

Concerning the Special Chamber's point that acts or activities undertaken in the disputed maritime area before delimitation do not violate the sovereign rights of the other state, Van Logchem argues that this approach renders sovereign rights of the coastal states non-existent "or alternatively cannot be breached, which seems to undercut the essence of possessing rights".[38] While Van Logchem's criticism of the Chamber's decision is reasoned and his concern for rights valid, there is a subtle point that is worth making. The Special Chamber did not say sovereign rights can never be breached. According to the Special Chamber's dictum in paragraph 592:

> the consequence of the above is that maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States.[39]

A literal reading of this paragraph suggests that if the area is claimed in bad faith, then there is a possibility that sovereign rights can be breached.[40] The approach of the Chamber illustrates the delicate balance struck between the rights and interests of two disputing states to the same overlapping maritime area. It is also worth remembering that maritime boundary delimitations by courts and tribunals are not rulings about which side has sovereign rights, but rather the exercise of delimiting a maritime boundary is about the equitable distribution of two provisionally valid sets of rights.

Another point made by Robin Churchill is that the Special Chamber gave a wider response than was necessary to decide the allegation that activities undertaken in the disputed maritime area by Ghana violated the rights of Côte d'Ivoire.[41] Churchill argues that "[t]he principle [referring to the dictum in para 592] as enunciated was probably wider than was necessary to decide the case since Ghana appears not to

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[38] Van Logchem (n 29) 174.
[39] *Ghana v. Côte d'Ivoire* (Judgment) para 592.
[40] For example, claims that do not have basis in international law.
[41] Robin Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2017' (2018) 33 *The International Journal of Marine and Coastal Law* 653, 663.

have undertaken any activities on what turned out to be Côte d'Ivoire's side of the boundary line".[42] Ghana had only undertaken activities on its side of the boundary, as established by the Special Chamber, and not in the 'Ivorian maritime area' as claimed by Côte d'Ivoire in its final submissions. The Special Chamber could have rejected the allegations regarding violations of sovereign rights based on its delimitation decision, as it did in relation to the allegation of the violation of article 83(3) of the LOSC for this exact reason of language choice by Côte d'Ivoire.[43] Churchill argues, "from a policy perspective the principle [referring to the dictum in para 592] is undesirable as it may encourage unilateral[44] hydrocarbon activity in disputed areas".[45] Because of this policy implication, Churchill favours the narrowest possible reading of the dictum in paragraph 592, which is that this pronouncement "is confined to the situation where a boundary has been determined by a court and not to the position before a boundary has been subject to possible adjudication".[46] Be that as it may, the Special Chamber's dictum is still very relevant for this thesis because it sheds light on both the nature of disputed maritime areas in general and the issue of sovereign rights, in particular.

The dictum means that, hypothetically, if the Chamber were to attribute the area to Côte d'Ivoire, activities undertaken by Ghana in the disputed maritime area pending the settlement, i.e., the delimitation judgment by the Special Chamber, would still not violate Côte d'Ivoire's rights. The explanation for this finding goes to the heart of the nature of disputed maritime areas and sovereign rights therein. Pending settlement, both disputing parties have potentially valid entitlements to the continental shelf and sovereign rights, but because the entitlements overlap, sovereign rights cannot be regarded as exclusive. Only after settlement of the maritime boundary the extent of those rights are established against each other, and become exclusive, on either side of the boundary. In the meantime, the rights of the parties co-exist and the sovereign rights of each of them must be balanced against each other.

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[42] Ibid.
[43] *Ghana v. Côte d'Ivoire* (Judgment), para 633. The use of this excuse by the Chamber is rather more unconvincing in relation to breach of articles 83(3) of the LOSC.
[44] As this thesis will demonstrate the principles and rules (normative framework) constrains the conduct of states.
[45] Churchill (n 38) 663.
[46] Ibid.

One consequence of the finding in paragraph 592 of *Ghana v. Côte d'Ivoire* is that disputing States feel less constrained in relation to what they do pending the settlement of the dispute as they are unlikely to be held internationally responsible *ex post facto* and there will not be monetary consequences – an issue that Judge Paik also raises in his separate opinion to the judgment of the Special Chamber in *Ghana v. Côte d'Ivoire*.[47] This consequence alongside the nature of rights and interests, i.e., that there exists a complex balance and co-existence between two sovereign rights pending settlement in disputed maritime areas, has implications for the questions that are being asked by this thesis.[48]

It is worth noting that the above discussion focused on continental shelf rights because the issue in point in *Ghana v. Côte d'Ivoire* was continental shelf rights.[49] The same logic applies to the EEZ. In the context of disputes over territorial sea boundaries, the situation is somewhat different. There is an explicit rule concerning the extent of territorial sea where states disagree, which is discussed further in Chapter IV.[50] States with opposite or adjacent coasts are not entitled, failing agreement between them to the contrary, "to extend their territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines".[51] This rule prevents, by default, overlapping territorial sea areas and hence there is no potential of overlapping 'sovereignties' for states to contend with. However, this rule becomes inapplicable in certain circumstances.[52] Overlapping claims to 'sovereignty' in territorial sea becomes inevitable where there is a dispute over land sovereignty from which projections to maritime areas are measured.

It is important in this respect to acknowledge the distinction between disputed maritime areas and disputes over land sovereignty. Territorial sovereignty disputes brought before courts and tribunals necessarily involve a determination by the judicial body on which party has sovereignty over the territory, as there is only one legally valid title.

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[47] Separate Opinion of Judge Paik in *Ghana v. Côte d'Ivoire* (Judgment) p. 7, para 18.
[48] They inform the choice and identification of 'principles' discussed in Chapter II.
[49] The dispute over the breach of sovereign rights was raised due to drilling of the seabed by Ghana.
[50] See section 2.2.
[51] Article 15 of the LOSC.
[52] By reason of historic title or other special circumstances. This point is further discussed below in Chapter IV, section 2.2.1.

For example, *Costa Rica v. Nicaragua* case[53], which is not a maritime delimitation case but raises similar issues, helps illustrate this distinction. In this case, activities undertaken in the disputed territory were held to violate Costa Rica's territorial sovereignty after the ICJ determined that the disputed territory between the parties belonged to Costa Rica.[54] Nicaragua's activities in the disputed territory, including excavating three caños and establishing a military presence, thus, were breaches of Costa Rica's territorial sovereignty.[55] According to the ICJ, the breaches of Costa Rica's sovereignty incur Nicaragua's responsibility and "the obligation to make reparation for the damage caused by its unlawful activities".[56] Concerning the unlawful military activities of Nicaragua, the ICJ, held that "by the very fact of the present Judgment and of the evacuation of the disputed territory, the injury suffered by Costa Rica will in all event have been sufficiently addressed".[57] As such, for the non-material injury suffered, the Court held that "the declaration by the Court that Nicaragua breached the territorial sovereignty of Costa Rica provides adequate satisfaction".[58] The Court also found that Nicaragua had "the obligation to compensate Costa Rica for material damages caused by Nicaragua's unlawful activities on Costa Rican territory".[59] This decision can be contrasted with the situation discussed above where activities undertaken in disputed maritime areas by one of the disputing states, claimed in good faith, do not violate the sovereignty or sovereign rights of the other. This is because even when the area is attributed to the latter state by a delimitation judgment, both states have undisputed title to land territory that creates entitlements to the maritime area and as such, are not considered unlawful activities requiring reparations.

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[53] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665.
[54] Ibid, para 92-93.
[55] *Costa Rica v. Nicaragua*, para 92-93.
[56] Ibid, para 93.
[57] *Costa Rica v. Nicaragua*, para 97.
[58] Ibid, para 139.
[59] *Costa Rica v. Nicaragua,* para 229. In its compensation decision, the Court awarded compensation for environmental damage and costs and expenses incurred by Costa Rica in connection with Nicaragua's unlawful activities, see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15, para 157 (1) (a) (b) and (2) (the operative part of the judgment).

If the disputed maritime areas are a result of a disputed title to land territory, courts and tribunals are unlikely to find that the activities undertaken in disputed maritime areas would violate sovereignty/sovereign rights over maritime areas, if, the undertaking state is found not to have title to land territory by a court or tribunal. Of course, in relation to title to land territory, the evacuation of the land territory and/or declaration of a breach of territorial sovereignty would provide adequate satisfaction. Nonetheless, because these types of mixed disputes tend not to get resolved in a short amount of time through agreement and/or states tend to resist the idea of submitting such sensitive disputes over land territory to third party dispute settlement, there remains the need for managing such disputed maritime areas pending agreement.

3.2 The issue of natural resources – are they shared?

While sovereign rights of coastal states co-exist and are subject to a complex balance, what is the status of natural resources of the marine environment in disputed maritime areas? Is it possible to argue that natural resources are 'shared' due to the complex balance of rights that exists in disputed maritime areas? As a first step, this thesis defines the term 'natural resources' with reference to particular provisions in the LOSC.[60] According to article 56 of the EEZ regime, coastal states have sovereign rights for "exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil…".[61] In this article, natural resources are categorised into two: living and non-living without going into further detail, but living resources consist mostly of fish. The regime of the continental shelf in Part VI of the LOSC further defines the term 'natural resources' as used in the continental shelf regime.[62] Article 77(4) of the LOSC clarifies that 'natural resources' comprises "the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species".[63] Proelss warns that it is not possible to distinguish living resources as belonging to the EEZ and non-living to the continental shelf.[64] Natural resources, then,

[60] See the definitions in Articles 56(1) and 77(4) of the LOSC.
[61] Article 56(1)(a) of the LOSC.
[62] Article 77(4) of the LOSC.
[63] Ibid.
[64] Alexander Proelss, Article 56, MN 14 in: Alexander Proelss, *UNCLOS: A commentary* (Beck, Hart, and Nomos, 2017) 426-427.

as a whole are composed of non-living "that are not of plant, animal, microbial, or other origin containing functional units of heredity" and 'living' that are primarily fish but also "the marine flora and genetic organisms living near and on the seabed, and in the subsoil respectively".[65]

The second issue here is whether natural resources identified above can be categorised as 'shared' because they are in a disputed maritime area. The term 'shared natural resources' are referred to in environment-related UNGA resolutions, for example, UNGA Resolution 3129 adopted on 13 December 1973.[66] The United Nations Environment Program (UNEP) prepared draft Principles of Conduct concerning shared natural resources, pursuant to the UNGA Resolution, but the preparatory work demonstrates that no conclusion was reached on the question of definition by the Working Group.[67] During these preparations, some governments and international organisations attempted to define 'shared natural resources' and these government comments are analysed in the Report of the Executive Director.[68]

According to Sweden, shared natural resources, common to all States, may include "the international commons such as the atmosphere of the earth, the existing climate and weather conditions, the resources of the sea and the sea-beyond national jurisdiction, and the existence of each and every species".[69] However, Sweden thought that natural resources, in the context of the above referred UNGA resolution (which specifically refers to two or more states), may preferably be limited to a small number of States, giving the examples of "adjacent waters whether facing the open sea or in an enclosed or semi-enclosed sea, stocks of fish which move between the waters of several States…".[70] According to the Economic Commission for Europe,

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[65] Ibid.
[66] Resolution on cooperation in the field of the environment concerning natural resources shared by two or more States, UNGA Resolution 3129 (XXVIII) of 13 December 1973.
[67] United Nations Environment Program: Governing Council approval of the report of the intergovernmental working group of experts on natural resources shared by two or more states, *International Legal Materials,* (1978) 17, 1091, 1097. (hereinafter 'UNEP draft principles')
[68] Co-operation in the field of the environment concerning natural resources shared by two or more states, UNEP Governing Council, third session in Nairobi, Report of the Executive Director (17 April – 2 May 1975) UN Doc UNEP/GC/44, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/K75/102/81/img/K7510281.pdf?OpenElement (hereinafter 'Report of the Executive Director').
[69] Report of the Executive Director (n 65), at p. 3, para 7.
[70] Ibid.

shared natural resources are limited to a small number of states and for the European region include enclosed or semi-enclosed seas such as the Mediterranean and the Baltic, river systems, migratory species of fish and wildlife and other special eco-systems spanning natural frontiers.[71] It was also opined by Brazil that shared natural resources are those in which sovereignty is shared between States, an example which was given by Brazil was 'international contiguous rivers' which form the boundary between two or more States.[72] According to the Executive Director the views of the governments and international organisations suggested that states assumed that international lakes and rivers, coastal waters, enclosed or semi-enclosed waters, fisheries and shared eco-systems are shared natural resources.[73]

The draft principles of conduct concerning shared natural resources define the term as those shared between two or more states, and interestingly states commenting on the definition of shared natural resources identified resources that are both beyond and within their territorial or maritime boundaries. Given the transboundary nature of ecosystems and natural resources, as well as the shared nature of sovereign rights in disputed maritime areas as discussed above, there are no clear reasons to argue that natural resources are not 'shared' in disputed maritime areas. This argument is even stronger in enclosed and semi-enclosed areas.[74]

The work of the International Law Commission (ILC) on shared natural resources is also helpful in the discussion of the meaning of 'shared' natural resources. The ILC decided to include 'shared natural resources' in its programme of work at its fifty-fourth session.[75] This work was proposed to focus on transboundary groundwater and oil and gas.[76] The scope of the work was natural resources within the jurisdiction of two or more states.[77] As such, it is understood that 'shared' natural resources meant those

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[71] Report of the Executive Director (n 65), para 8.
[72] Ibid, para 9.
[73] Report of the Executive Director (n 65), para 10.
[74] Article 123 of the LOSC. States have obligations to cooperate.
[75] Yearbook of the ILC, 2002, vol.II (Part Two), Report of the commission on its work to the General Assembly at its fifty-fourth session, at p. 11, para 20, available at: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2002_v2_p2.pdf
[76] Yearbook of the ILC, 2000, vol.II (Part Two), Report of the commission to the General Assembly at its fifty-second session, at p. 141 (Annex), https://legal.un.org/ilc/publications/yearbooks/english/ilc_2000_v2_p2.pdf
[77] Ibid.

within the jurisdiction of two or more states. The ILC completed the work on transboundary groundwaters with the adoption of draft articles on the Law of Transboundary Aquifers at its sixth session[78] and shortly after the work on oil and gas was discontinued.[79] However, the documents and deliberations of the ILC provide some guidance as to whether natural resources in disputed maritime areas can be regarded as shared natural resources. In this regard, the comments of States to the questionnaire circulated by the ILC Secretariat help consider the meaning of 'shared' natural resources.[80]

The ILC received responses from 35 states.[81] Question one in the questionnaire was "Do you have any agreement(s), arrangement(s), or practice with your neighbouring State(s) regarding the exploration and exploitation of *transboundary oil and gas resources* or for any other cooperation for such oil or gas? Such agreements or arrangements should include, as appropriate, maritime boundary delimitation agreements, as well as unitization and *joint development agreements* or *other arrangements*".[82] It is noteworthy that states recalled arrangements on shared natural resources (oil and gas, in this case) that straddle an already established boundary, as well as those in disputed maritime areas, in the absence of a boundary. Thailand, Jamaica, and Australia included their hydrocarbon arrangements with other states in their disputed maritime areas.[83] From the framing of the question circulated to the governments, the Commission implicitly acknowledges that agreements or arrangements in disputed maritime areas concern 'shared natural resources'. This can be assumed from mentioning of the 'joint development arrangements or other arrangements' with the use of the words 'as well as' after reference to maritime

[78] Yearbook of the ILC 2008 vol.II (Part Two), Report of the commission to the General Assembly at its sixtieth session, at p. 19, available at: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2008_v2_p2.pdf
[79] The reasons behind the decision are mentioned in the ILC's report on its sixth session (3 May – 4 June and 5 July – 6 August 2010), UN Doc A/65/10, at p.343-344, paras 381-383, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/541/71/pdf/N1054171.pdf?OpenElement
[80] Shared natural resources: Comments and observations received from Governments (29 January and 17 June 2009) UN Doc. A/CN.4/607 and add.1, available at: https://legal.un.org/ilc/documentation/english/a_cn4_607.pdf
[81] Ibid, at p. 106, para 2.
[82] Comments and observations received from Governments (n 77) at p. 107 [emphasis added].
[83] Ibid, at p. 108, 110, 113. It is also curious that Republic of Korea omitted its joint development agreement with Japan in the disputed maritime area.

boundary delimitation agreements.[84] It is also worth noting that from the beginning of the ILC's work, natural resources in disputed maritime areas were thought of as a category of shared natural resources. This is evidenced in the outline produced by Robert Rosenstock, who suggested the topic to the ILC, for the work on shared natural resources which included a reference to "situations where no boundary exists (Libyan Arab Jamahiriya – Malta)".[85]

For the reasons given above, natural resources, not limited to oil and gas, found in disputed maritime areas are regarded as 'shared natural resources' in this thesis.[86] The natural resources in disputed maritime areas are 'shared' because, while the area is in dispute, both states have valid claims of sovereign rights to explore and exploit and conserve and manage the same natural resources located in an overlapping maritime area. As discussed in the previous section, disputing states' sovereign rights co-exist and are, in a sense, shared. It is therefore logical that the natural resources, over which states exercise certain sovereign rights, are also their shared concern. Since this characterisation of natural resources of disputed maritime as shared, certain governance principles apply, as discussed later in this thesis.[87]

It is also important to emphasise that while the issue of co-existing coastal state competencies is a bilateral issue, the natural resources do not only concern two disputing states. Third states and the international community may also have rights and interests concerning the management of natural resources. For example, the rights of landlocked and disadvantaged states are recognised in the LOSC[88], albeit they are regarded as weak.[89] Whether it is exploration and exploitation, or,

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[84] While the use of joint development arrangements is not limited to disputed maritime areas but are also established when there is a boundary delimiting maritime zones. Such joint arrangements are usually located near a maritime boundary so that states on either side of the boundary can explore and exploit the resources together to ensure the unity of deposits.
[85] Yearbook of the ILC, 2000 (n 73).
[86] In the Conciliation between Timor-Leste and Australia, the discussion of the Greater Sunrise gas fields was separated from the discussion of the maritime boundary and established a special regime for it. It was characterised as a "shared resource" by the Commission. PCA, A Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between Timor-Leste and Australia, Case no 2016-10, 9 May 2018, paras. 251 and 299, available at: https://pcacases.com/web/sendAttach/2327
[87] For the discussion of these principles see Chapter II.
[88] See articles 69 and 70 of the LOSC.
[89] See James Harrison, Article 69, MN 12 in Proelss (n 61) 547.

management and conservation of shared natural resources, multiple rights and interests co-exist, i.e., that of the disputing states, third states, and not the least international community for their proper management and sustainable use. Hence, there are broader values and interests, beyond the interests of claimant states, which must be taken into account, in the protection of the marine environment and sustainable use of natural resources.[90] For example, the concepts of straddling and highly migratory fish stocks indicate the interests that third states also have in the resources of a disputed maritime area.[91] According to article 63(1) and (2) of the LOSC, where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, and in an area beyond and adjacent to the zone, these coastal states and the States fishing for such stocks "shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary" for their conservation and development.[92] Article 64 also prescribes that both coastal states and other states that fish for highly migratory spices in the region cooperate directly or through appropriate international organisations to ensure conservation and promote optimum utilisation of such species.[93] This thesis explores the role of multilateral (regional) institutions for the management of disputed maritime areas in Chapter V.

4 Background to the thesis and research questions

4.1 Literature on disputed maritime areas and the concept of 'governance'

Disputed maritime areas have attracted the attention of legal scholars consistently since the negotiation and entry into force of the LOSC. Rainer Lagoni's seminal work *Interim Measures Pending Maritime Delimitation Agreements* considered the obligations of disputing states vis-à-vis each other in disputed maritime areas.[94] Sun Pyo Kim has also written on the legal framework applicable in disputed maritime

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[90] See the next Chapter II.
[91] Articles 63 and 64 of the LOSC.
[92] Article 63 of the LOSC.
[93] Article 64 of the LOSC and Article 8 of the Agreement for the Implementation of the Provisions of the LOSC relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adoption 4 August 1995, entry into force 11 December 2001) 2167 *UNTS* 3 (hereinafter 'UNFSA').
[94] Rainer Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78 The American Journal of International Law 345.

areas.[95] Youri Van Logchem has considered the scope of unilateral activities that states may undertake in disputed maritime areas in the absence of provisional arrangements.[96] David Anderson and Youri van Logchem have also discussed the rights and obligations of states in disputed maritime areas.[97] All of these works focus on the interpretation of rules in articles 15, 74(3) and 83(3) of the LOSC relating to disputed maritime areas. The British Institute of International and Comparative Law has also undertaken a study to further understand the requirements of articles 74(3) and 83(3) of the LOSC in the absence of provisional arrangements. The principal goal of that study was "to collect and analyse the practice of States in respect of" disputed maritime areas which "may provide evidence of States' understandings of the meaning of" the obligation not to jeopardise or hamper under article 74(3) and 83(3) of the LOSC or state practice that may be evidence of a customary international law principle.[98] Similarly, Robin Churchill has outlined the obligations of states in disputed maritime areas in light of recent judgments of international courts and tribunals, including the arbitral judgment concerning the dispute between Ghana and Côte d'Ivoire.[99]

In short, the existing literature on disputed maritime areas focuses on the bilateral legal obligations of states under articles 74(3) and 83(3) of the LOSC, the content, and practical application of a particular obligation, such as the obligation of restraint and the obligation to enter into provisional arrangements.[100] By comparison, this thesis integrates and situates disputed maritime areas within the broader normative and institutional contexts within which they exist.

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[95] Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijhoff, 2004).
[96] Youri van Logchem, 'The Scope for Unilateralism in Disputed Maritime Areas' in C Schofield, S Lee, and MS Kwon (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff 2014).
[97] David Anderson and Youri van Logchem, 'Rights and Obligations in Areas of Overlapping Maritime Claims' in S. Jayakumar and R. Beckman (eds), *The South China Sea Disputes and the Law of the Sea* (Edward Elgar 2014).
[98] *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas* (BIICL 2016) (hereafter 'BIICL Report').
[99] Robin Churchill, 'International Law Obligations of States in Undelimited Maritime Frontier Areas' in Richard Barnes and Ronán J Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges* (Brill | Nijhoff 2021), 141.
[100] Although there are still some aspects of those obligations that are being discussed and not fully established.

On top of bilateral disputes between states over such maritime areas, concerning who gets to exercise certain rights and who does not, and to whom the maritime area and its natural resources belong, there is a need and space for studies to take into account broader processes and context within which disputed maritime areas exist. Given that the health of the ocean faces challenges from overexploitation of fisheries, pollution from various sources as well as impacts of climate change, ocean acidification and loss of biodiversity, it is important that states comply with their obligations to protect and preserve the marine environment even in disputed maritime areas[101], and especially when a solution of the maritime boundary dispute is out of sight. This broader context is important to consider in an analysis of disputed maritime areas. The transboundary nature of oceans means that no one state can produce effective responses and policies to tackle these problems.[102] In the face of these multiple challenges to the oceans in general, within which disputed maritime areas exist, 'ocean governance' discourse provides a fresh perspective to the problem of disputed maritime areas. Answers to challenges of disputed maritime areas may be found in the process and structures of contemporary ocean governance that are inclusive and cooperative, which "take a wide range of forms and occur in a variety of institutional settings".[103]

This thesis takes a 'governance' approach – influenced by the literature on 'ocean governance' – to consider disputed maritime areas from a different angle, because while there may be a bilateral dispute between two states, there are other interests and actors that ought to be taken into account. Taking this approach enables this research to offer a distinct perspective on disputed maritime areas – one that moves away from routine narratives of which activities are lawful or unlawful, or in other words, what states can, and cannot do, pending delimitation. While such research has been valuable in forming the foundation upon which this thesis is built, the concept of governance helps draw attention to broader processes and issues implicated in

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[101] PCA, *In the Matter of the South China Sea Arbitration (Republic of the Philippines v. the People's Republic of China),* Award of 12 July 2016, available PCA website at: http://www.pcacases.com/web/view/7 (hereinafter '*South China Sea Arbitration (Award)*') para 927.
[102] For example, the third recital of the Preamble of the LOSC observe that "the problems of ocean space are closely interrelated and need to be considered as a whole".
[103] Yoshinobu Takei, 'Demystifying Ocean Governance' in Seline Trevisanut, Nikolaos Giannopoulos, and Rozemarijn Roland Holst (eds), *Regime Interaction in Ocean Governance: Problems, Theories and Methods* (Brill 2020), 24.

disputed maritime areas and enable this thesis to consider broader normative and institutional framework for the management of disputed maritime areas with those issues in mind.

Reference to 'ocean governance' literature here, at the outset, serves a twofold purpose: (a) it provides context to why the concept of 'governance' is being employed and, (b) what 'governance' entails for this thesis. The use of the term 'ocean governance' in legal research comes from increased awareness of the need among academics to address and account for the interrelationship between legal and non-legal elements that make up the international framework of 'ocean governance'. It is the same inclination and recognition here in the context of disputed maritime areas that, while law is central for regulating the interactions between states, actors, and interests, the concept of governance as a heuristic device[104] illustrates that there is more at play than law. The concept of 'governance' acts as an optic and enables this thesis to demonstrate the role of principles, rules, and institutions in managing disputed maritime areas.

Before briefly outlining the concept of 'ocean governance' as referred to in the literature, it is useful to begin with the concept of governance. According to Rosenau 'governance' like government refer "to purposive behaviour, to goal-oriented activities, to a system of rule[s]".[105] However, unlike government, governance "refers to activities backed by shared goals that may or may not derive from formally prescribed responsibilities" and "do not necessarily rely on police powers to overcome defiance and attain compliance".[106] Therefore, it can be said that governance is the way in which society has instituted certain objectives, priorities, principles, and mediate differences. At the international level, the concept of governance is especially conducive as it explains the "modicum of order" and "routinized arrangements" that make up the international system alongside the work of international organisations and which regulate and facilitate relations of interdependent states, in the absence of

[104] Thomas G. Weiss, 'Governance, good governance and global governance: conceptual and actual challenges' 21 Third World Quarterly 795, 808.
[105] James N Rosenau 'Governance, Order and Change in World Politics' in JN Roseanau and Ernest-Otto Czempiel (eds) *Governance Without Government: Order and Change in World Politics* (Cambridge University Press, Cambridge 1992) 4.
[106] Ibid.

an overarching authority.[107] The concept global governance started to emerge in the literature too, as a result of "the general perception of the limitations inherent in state institutions" where focus is shifting towards non-state actors, such as supra-national institutions, which participate in the process of governance for the conduct of matters that are humanity's shared concerns.[108]

The term "ocean governance" has gained considerable attention in the last decade among law of the sea scholars. The term connotes management of ocean use and activities.[109] However, the concept lacks precision and it is used in a variety of ways in the literature.[110] According to Rothwell and Stephens 'ocean governance' is a process whereby state actors and a broad range of other actors cooperate to achieve common objectives.[111] They understand ocean governance as an amalgamation of "formal and informal rules, arrangements, institutions and concepts which structure the ways in which sea space is used, how ocean problems area monitored and assessed… implicating an array of global and regional organisations".[112] In a similar vein, a study undertaken jointly by the IMO International Maritime Law Institute and Nippon Foundation defines 'global ocean governance' as "the international process in which the close cooperation by States, intergovernmental institutions, and other public and private transnational actors aim to achieve the desired objectives laid down in the 1982 UNCLOS, as well as other marine and maritime-related instruments at the global, regional, national and sub-national levels of interaction".[113] In a survey of the historic development of the concept, Elizabeth Mendenhall similarly observes that 'ocean governance' comprises of "rules, norms, principles, and decision-making procedures designed to collectively manage the myriad users and multiple uses of the Earth's

[107] Rosenau (n 102) 7.
[108] Douglas M Johnston, 'The Challenge of International Ocean Governance: Institutional, Ethical and Conceptual Dilemmas' in DR Rothwell and DL VanderZwaag (eds) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (Routledge, London: 2006) at 349.
[109] Yoshinobu Takei, 'A Sketch of the Concept of Ocean Governance and Its Relationship with the Law of the Sea' in Cedric Ryngaert, Erik J Molenaar and Sarah Nouwen (eds), *What's Wrong with International Law?* (Brill | Nijhoff 2015), 48- 62.
[110] Ibid 48-62. Takei surveys the use of the term ocean governance and its content in the literature.
[111] Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2010) 462.
[112] Ibid.
[113] David J Attard, David M Ong and Dino Kritsiotis, *The IMLI Treaties on Global Ocean Governance*, vol I: UN and Global Ocean Governance (Oxford University Press 2018) xlvii.

oceans".[114] The principles, rules, and decision-making procedures make-up the building blocks of the process of ocean governance that takes place at unit(state), bilateral and multilateral (regional or global) levels.

Based on these definitions in the literature and for the purposes of this thesis, 'governance' is understood as a process that is made up of three pillars. The central pillar of ocean governance is 'rules' which are found in the LOSC which, as a legal framework, regulates most maritime activities.[115] Then, there is the institutional pillar ranging from international institutions (including courts and tribunals), regional organisations, such as regional seas bodies or regional fisheries management organisations (RFMOs) that partake in the process of 'governance' by producing policies, practices, measures and rules for all actors engaged in the process of governance. Some of these 'institutional outputs' are non-binding, such as action plans that support formal rules. Finally, the system of governance includes general governance principles. Principles referred to here are based on the common values or objectives of the international community in general, e.g., the peaceful resolution of disputes, including those found in the ocean governance instruments.[116] Thus, the concept of governance as used in this thesis concerns, in short, principles, rules and institutions which all are part of the process of governance. Governance as a concept is not employed to point to the weaknesses or 'gaps' in the existing legal arrangements or their fragmented nature[117], but to offer an alternative perspective on disputed maritime areas by reframing the problem in the broader context and framework within which it exists. It enables this thesis to consider the management of disputed maritime areas by taking into account broader processes, instead of looking at disputed maritime areas through legal lenses that are black and white. It is also important to clarify at the outset that the 'process' of disputed maritime area governance involves temporal elements, such as change and development. Just as relations between states are not static, their disputes are not static either. Social, political economic and

[114] Mendenhall E, 'The Ocean Governance Regime: International Conventions and Institutions' in P G Harris (ed) *Climate Change and Ocean Governance: Politics and Policy for Threatened Seas* (Cambridge University Press 2019) 27.
[115] For example, see the European Commission in its Consultation Document on 'international ocean governance' at p. 1. Available online at: https://ec.europa.eu/info/sites/default/files/consultation-ocean-governance-consultation-document_en.pdf
[116] Rothwell and Stephens (n 108) 462.
[117] See, the discussion in the Preface in Attard, Ong and Kritsiotis (n 110).

environmental conditions surrounding disputed maritime areas can change over time. The discussion of different processes of governance in this thesis is, therefore, inherently understood as dynamic and ever-changing. For example, Chapter VII acknowledges and makes the argument that conciliation may not bring about an agreement between states at the specific time that it has been undertaken, but underlines that change and development in political and economic circumstances may lead to parties revisiting the recommendations of a conciliation commission with an attempt to reach an agreement at a later date.

4.2 Research questions and methodology

As mentioned earlier in this introduction, the wider question at the heart of this thesis is: what is the normative and institutional framework for managing disputed maritime areas? The following sub-questions guide this thesis and facilitate answering the wider research question of this thesis. The first sub-question is: what are the principles of international law relevant for, or applicable to, disputed maritime areas? The second sub-question is: what are the rules of the LOSC on conduct in disputed maritime areas? Finally, what is the role of institutions in managing disputed maritime areas? This thesis seeks to survey the normative and institutional frameworks in managing disputed maritime areas pending delimitation. This thesis employs doctrinal legal research methodology.

The central argument and main original contribution of this thesis is that the management of disputed maritime areas is best seen as a process, which is based upon principles, that takes place at multiple levels of governance and with the inclusion of institutions and through broader processes, within which disputed maritime areas exist. The different processes are not mutually exclusive, they should rather be seen as complementary to each other.

The argument starts with the exploration of the normative framework applicable to disputed maritime areas which is made up of governance principles, and rules (found in the LOSC). This normative framework requires certain conduct from states, namely cooperation in managing disputed maritime areas, including in the context of resource and marine environmental conservation and management, and mutual restraint

whenever necessary. Institutions are important both at the bilateral level for managing disputed maritime areas as well as at the multilateral level. Institutionalised cooperation can diffuse tensions and focus states on their common objectives. Cooperation at the multilateral level through regional institutions help diffuse tensions between disputing states for instance by handling environmental, fisheries or other ocean-related governance in a multilateral setting, where regional standards are established and coordinated. After discussing three levels of 'governance' (unilateral, bilateral, and multilateral), this thesis focuses the role of judicial institutions in managing disputed maritime areas, by paying particular attention to the tools and procedures which are at the disposal of international courts and tribunals. Finally, this thesis considers conciliation, a non-judicial dispute settlement procedure and argues that the features of this non-binding dispute settlement procedure make it a promising procedure for assisting states in finding solutions to their disagreements over the management of disputed maritime areas.

5 The structure of the thesis

Chapter II explores principles, which have wide application as a matter of international law, that are applicable to disputed maritime areas. The principles form the basis of the normative framework that the rest of the thesis is based upon. Principles are also the basis of the disputed maritime area 'governance' – the conceptual framework. For instance, one of those is the principle of cooperation – central to public international law and law of the sea.[118]

Chapters III and IV focus on the rules – second pillar of 'governance'. These chapters discuss the rules found in the LOSC. Together with 'principles' they make up the normative framework on how to manage disputed maritime areas pending delimitation. Chapter III starts with the examination of the obligation to make every effort to enter into provisional arrangements pursuant to articles 74(3) and 83(3) of the LOSC and considers examples of arrangements entered into by states. The chapter then explores some of the challenges and potential ways to address them through a

[118] *MOX Plant (Ireland v United Kingdom),* Provisional Measures, Order of 2 December 2001, ITLOS Reports 2001, p. 95, para 82.

‘governance’ perspective. Chapter IV considers the obligation not to jeopardies or hamper, the specific application of the principle of non-aggravation/mutual restraint. This chapter engages with doctrinal questions regarding the application of the rule, including to instances of mixed disputes and in territorial sea. Finally, this chapter considers the phenomenon of unilateralism from the perspective of the normative framework.

Chapter V focuses on ‘institutionalised’ cooperation at the multilateral level, especially on regional institutions, to investigate and illustrate the role that they play in the process of disputed maritime area management. The analysis focuses on the key components of regional cooperation through examples and considers opportunities and challenges that are associated with such cooperation in the context of disputed maritime areas. This chapter underscores that institutionalised cooperation at the multilateral level complement bilateral arrangements for the management of the disputed maritime area and how bilateral arrangement are ‘nested’ within the broader multilateral frameworks.

Chapter VI explores the role of adjudicative institutions (courts and tribunals) concerning the management of disputed maritime areas. This first deals with the question of whether disputes arising pending delimitation may be referred to a court or tribunal under Part XV of the LOSC. As such, the chapter considers some important doctrinal questions before illustrating the relevance and importance of judicial dispute settlement in managing disputed maritime areas. In doing so, this chapter focuses on certain judicial tools which are not often considered for this purpose, namely, provisional measures, that could be utilised for the management of the dispute and disputed maritime area in favour of all the parties and the international community.

Chapter VII focuses on conciliation as another mechanism, which may assist states in the management of their disputed maritime areas by facilitating the settlement of disputes arising pending delimitation. In comparison to adjudication or adjudication discussed in Chapter VI, conciliation is more flexible and has a lot of advantages for some disputes, such as maritime delimitation and disputed maritime areas, because conciliation commissions can address a wide variety of complex issues.

Chapter VIII concludes the thesis with final thoughts on the management of disputed maritime areas.

Chapter II: Principles of governance in the context of disputed maritime areas

1 Introduction

The purpose of this chapter is to identify and discuss principles, as referred to in Article 38(1)(c) of the ICJ Statute, applicable to disputed maritime areas as reflected in treaties, binding resolutions of international organisations, state practice and judicial decisions. Three factors have guided the choice of principles for this chapter. First is the fundamental character of some, if not most, of the principles discussed in this chapter for the regime of international law. The second factor is the disputed nature of the maritime area[1], and finally, the existence of 'shared natural resources', as discussed in Chapter I.[2] These principles reflect how disputing states should conduct themselves in disputed maritime areas.

Many principles discussed here are grounded in the UN Charter as general principles, but their contents are shaped by the specific goals of the regime within which they operate – i.e., peace and security, human rights, environmental protection, and dispute resolution.[3] The UN Charter enshrines several principles that both the UN and its members shall act in accordance with, in the pursuit of maintenance of international peace and security. These principles, now widely regarded as fundamentals of international law, include peaceful settlement of international disputes, good faith, and cooperation.[4] Some of these principles have been restated[5], such as in the 1970 Declaration on Friendly Relations[6], and new ones enacted, such as the 1972 Stockholm Declaration[7] and 1992 Rio Declaration[8], as a result of developments in

[1] See Introduction, section 3 in general.
[2] See Introduction, section 3.2 for the discussion of meaning of the term 'shared natural resources'.
[3] For instance, in the law of the sea regime, the principle of mutual restraint is given explicit affect by articles 74(3) and 83(3) of the LOSC in relation to the exclusive economic zone (EEZ) and continental shelf.
[4] Articles 1 and 2 of the UN Charter.
[5] Manila Declaration on the Peaceful Settlement of Disputes, UNGA Res 37/10 (15 November 1982).
[6] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970), (hereinafter 'Friendly Relations Declaration').
[7] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc A/ CONF.48/14/Rev.1 (hereinafter 'Stockholm Declaration').
[8] Rio Declaration on Environment and Development, 13 June 1992, UN Doc A/CONF.151/26.

different fields of international law over the years. In addition to declarations outlining and stating various principles, courts and tribunals have made invaluable contributions by clarifying the meaning and content of these principles in different contexts.

The discussion of principles serves a twofold purpose. First, as one of the three pillars of 'governance', as discussed in the Introduction, principles provide an overarching framework that can be applied to all disputed maritime areas, setting the parameters and normative standards of conduct for coastal states. Second, principles also provide a general framework within which the forthcoming discussion in this thesis takes place as well as informing the forthcoming chapters and choices.[9] The governance principles discussed in this chapter are relevant to different phases of the dispute and they are also interlinked. For example, principles apply when a dispute arises, they apply to the conduct of the parties pending settlement guiding states to either take or refrain from particular actions and they apply in the dispute settlement phase, for example when parties are involved in negotiations or a third-party dispute settlement, such as arbitration or adjudication. Moreover, the principles of governance discussed in this chapter are inter-linked. Briefly, principle of good faith is closely interlinked with other principles, such as principle of peaceful settlement of international disputes as well as principle of cooperation. The chapter explains the nature and content of each principle that is under consideration by drawing on relevant international instruments and judicial decisions. The principles under consideration are as follows: the principle of good faith (section 2); the principle of peaceful resolution of international disputes (section 3); the principle of non-aggravation/ and mutual restraint (Section 4); the principle of cooperation (Section 5); the principle of protection and preservation of the marine environment (Section 6).

2 Principle of good faith

The principle of good faith is qualified as a founding, and universally recognised rule of, the international legal system.[10] In other words, the principle of good faith is a given:

[9] For example, principle of peaceful settlement of disputes is the starting point of the two chapters that deal with third party dispute settlement in Chapters VI and VII.
[10] In fact, it is an ever-present element of almost all legal systems; C Tomuschat, 'Obligations Arising for States Without or against their will' (1993) 241 *RCADI* 322.

its existence does not rest on practice, such as norms of customary international law. It is a normative principle of conduct – correct behaviour – expected by all actors at the international system.[11] According to the ICJ's jurisprudence in the *Case Concerning Border and Transborder Armed Actions,* the ICJ recalled that good faith is "one of the basic principles governing the creation and performance of legal obligations" but "is not in itself a source of obligation where none would otherwise exist".[12] Understood this way as a standard, good faith is abstract and does not, in itself, impose obligations or entail specific consequences, but rather modifies the rule it qualifies: it operates in the making, interpreting and enforcement of other legal norms or rules. [13] The principle of good faith is central to the operation of international law. For instance, legal instruments, including treaties employ the principle of good faith to reinforce the purposes of a regime. For instance, the LOSC prescribes that states exercise their rights and implement their obligations under the Convention in good faith and in a manner that would not constitute abuse of rights.[14] In *M/V Louisa* case, where the application of this provision was invoked for the first time before ITLOS, the Tribunal clarified that breach of good faith cannot be invoked on its own, it is only relevant when the rights, jurisdiction or freedoms, recognised in the LOSC are exercised in an abusive manner.[15] Moreover, it is argued that the good faith principle strengthens certain aspects of the Convention and supports the attainment of the purposes of the Convention, such as the protection of the marine environment.[16]

Due to its function in the international legal system, the principle of good faith qualifies the rest of the principles discussed in this chapter. For instance, good faith has

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[11] Colombian representative at the UN Conference: "proclaim that international life require[s] a minimum of morality as a normative principle of conduct for peoples. This minimum cannot be anything else than full good faith" Columbia Documents of the United Nations Conference, Vol VI, Doc 1123 I/8, 20 June 1945, 8.

[12] *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras),* Judgment, ICJ Reports 1988, 69, para 98.

[13] Guillaume Futhazar and Anne Peters, 'Good Faith' in Jorge E Viñuales (ed) *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020) 191; Kolb disagrees with this proposition that good faith does not create in itself rights and obligations, see Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017) 30-31.

[14] Article 300 of the LOSC.

[15] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain),* Judgment, ITLOS Reports 2013, p. 4, at p. 43, para. 137.

[16] Anastasia Telesetsky, '"Good Faith" Obligations to Protect and Preserve the Marine Environment: A Proposal on Uniform High Seas Fisheries Management' in C Schofield, S Lee, and MS Kwon (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff, 2014) 449–71.

application in dispute settlement process. In the *North Sea Continental Shelf* cases, the ICJ opined that negotiating in good faith entails behaving in such a way that negotiations are not artificial but carry an intent to reach an agreement, which means parties have to be prepared to make concessions.[17] In the *Fisheries Jurisdiction*[18] case, the ICJ recalled that negotiating in good faith require that parties take into account the other party's rights and positions in the process of negotiations.[19] Besides its application in the process of dispute settlement, the principle of good faith entail certain behaviours from states in disputed maritime areas. First, the awareness of the other party's claim to the same maritime area, and as such that a dispute exists, require states in the phase 'pending settlement', not to aggravate the dispute and act with self-restraint pursuant to principle of non-aggravation/mutual restraint. Second, parties should cooperate with each other relating to matters of governance of natural resources and protection of the marine environment. In the context of cooperation, good faith requires that parties notify, inform, and offer participation in any activity that relate to the disputed maritime area, its natural resources, and the marine environment pursuant to principles of cooperation and protection and preservation of the marine environment.

3 Principle of peaceful resolution of international disputes

The peaceful settlement of disputes, as a principle of international law, is the cornerstone of the contemporary international system. The UN Charter enshrines this general duty, which requires its members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".[20] Chapter XI of the UN Charter specifically deals with the pacific settlement of disputes and provides details on the principle of peaceful settlement of disputes identified earlier, in Article 2 (3) of the UN Charter. The peaceful means by which states shall seek a solution to any dispute are "negotiation, enquiry, meditation, conciliation, arbitration, judicial settlement, resort to regional agencies or

[17] *North Sea Continental Shelf,* para 85(a).
[18] *Fisheries Jurisdiction (United Kingdom v. Iceland)* Merits, Judgment, ICJ Reports 1974, p.3.
[19] Ibid, para 78.
[20] Article 2 (3) of the UN Charter.

arrangements, or other peaceful means of their choice" as appropriate to their circumstances and nature of their dispute.[21]

The 1970 Declaration on Friendly Relations further expands on the content of the principle. According to the Declaration, states shall seek "early and just settlement of their dispute".[22] Moreover, states are obliged to "continue to seek a settlement of the dispute by other peaceful means agreed upon by them" if they fail to reach an agreement based on the peaceful means identified above.[23] In other words, this principle continues to apply so long as a dispute exists. At this point, it is worth considering the definition of a dispute, however superfluous it may appear at first sight. This is for two reasons. First, existence of a dispute may be in doubt, and may even itself be disputed by states in order to avoid the obligations attached to that condition, such as entering into negotiations, or even to contest the jurisdiction of an international court or tribunal.[24] For example, in *Ghana v. Côte d'Ivoire* case, Ghana objected to the existence of a maritime boundary delimitation dispute and asked the Tribunal to declare existence of a 'tacit' boundary, arguing that parties were in a tacit agreement, based on the perceived acquiescence of Côte d'Ivoire, to what Ghana referred as 'customary equidistance line'.[25]

In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice (PCIJ) gave the following definition: "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.[26] In another case, according to the ICJ, a dispute is "a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations".[27] The ICJ have also extensive

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[21] Article 33 (1) of UN Charter.
[22] Friendly Relations Declaration (n 6).
[23] Ibid.
[24] It has been established by the case law that the existence of a dispute is a requirement of jurisdiction, see *Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom),* Preliminary Objections, Judgment, ICJ Reports 2016, p. 833, para 36.
[25] *Ghana v. Côte d'Ivoire* (Judgment), paras. 68 and 110.
[26] *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, 1924, PCIJ (Ser. A) No. 2, at 11.
[27] *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950 (first phase), ICJ Reports 1950, at p. 65, at 74.

jurisprudence regarding the determination of the existence of a dispute in various cases. According to the ICJ, existence of a dispute is a matter "of substance, not of form"[28] and that "[w]hether a dispute exists is a matter for objective determination by the Court".[29] In the *Marshall Islands v. United Kingdom,* the ICJ further held that "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was *aware,* or could not have been unaware, that its views were "positively opposed" by the applicant".[30] While there were some criticism of this element of 'awareness'[31], existence of a dispute between two parties naturally requires that both parties either verbally or in action demonstrating their disagreement. Therefore, awareness is not a separate criterion but rather it represents the underlying logic of the Court's analysis of the evidence submitted in relation to opposition of views to decide whether a dispute exists or not.

The Friendly Relations Declaration, various other General Assembly resolutions,[32] and the *Nicaragua* judgment[33] of the ICJ reaffirmed that the peaceful settlement of disputes is an obligation under international law. One can also find a specific application of this general principle to settle disputes peacefully in the LOSC. The Convention stresses that parties shall "settle any dispute concerning interpretation or application of this Convention by peaceful means" in accordance with Article 2(3), and by means identified in Article 33(1), of the Charter.[34] As such there is an emphasis on peaceful settlement of disputes, rather than resorting to prohibited use of force which endangers international peace and security.[35] In *Guyana v. Suriname,*[36] ITLOS found that the expulsion of the CGX oil rig and drill ship C.E. Thornton by Suriname on 3 June 2000

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[28] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70, para 30.
[29] *Marshall Islands v. United Kingdom*, para 39.
[30] Ibid, para 40 [emphasis added].
[31] In fact, the Court was divided in relation to the question of existence of a dispute. The objection of the UK was upheld eight votes in favour and eight votes against.
[32] See the Manila Declaration (n 5) para 2; UNGA, Solemn Appeal to States in Conflict to Cease Armed Action forthwith and to Settle Disputes between them through Negotiations, (UN Doc A/RES/40/9) para 2.
[33] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgement, ICJ Reports 1986, p. 14, para 290.
[34] Article 279 of the LOSC.
[35] Article 2(3) and (4) of the UN Charter.
[36] PCA, Arbitral Tribunal Constituted Pursuant to Article 287, and in accordance with Annex VII, of the LOSC in the matter of an Arbitration between Guyana and Suriname, Award of 17 September 2007, available online at PCA website: https://pcacases.com/web/sendAttach/902 (hereinafter '*Guyana v. Suriname*').

from the disputed area constituted a threat of the use of force in breach of the Convention, the UN Charter, and general international law.[37] ITLOS further emphasised the peaceful settlement of disputes in this case by pointing that under the LOSC there such means of addressing disputes concerning exercise of coastal state rights in disputed maritime area.[38]

According to Judge Nagendra Singh in *Fisheries Jurisdiction* case, a negotiated solution in every dispute may not be appropriate, or simply out of question, but in some circumstances, negotiations are necessary and flow from the nature of the dispute.[39] In that case, the dispute related to traditional fishing rights. According to Judge Singh, such problems best lend themselves to settlement by negotiation or other diplomatic means, such as mediation, good offices, and conciliation.[40] The same could be said for settling disputes relating to the use of resources and exercise of jurisdiction in disputed maritime areas because such disputes are complex, and compromise is necessary as there is usually more than one solution to the dispute.[41]

While the principle of peaceful settlement of disputes probably resonates with most states, it is nearly impossible to impose an obligation of achieving a certain end, i.e., the settlement of the dispute. The idea of 'peaceful' settlement suggests that this is an obligation of conduct, i.e. means specifically determined by the obligation itself.[42] By the virtue of the principle, states should 'seek' settlement of disputes, in good faith and in a spirit of cooperation.[43] As observed in numerous contexts, including in the context of disputed maritime areas, states may refuse to negotiate the settlement of their dispute and maintain the status quo of perpetual 'dispute'.[44]

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[37] Ibid, para 445 and dispositif para 488(2).
[38] ITLOS referred to the compulsory dispute settlement procedures available under section 2 of Part XV, see *Guyana v. Suriname*, para 446. This thesis further discusses the role of courts and tribunals in the context of disputed maritime areas in Chapter VI.
[39] Declaration of Negendra Singh in *Fisheries Jurisdiction,* p. 41.
[40] Ibid.
[41] This thesis returns to the question of dispute settlement in Chapters VI and VII.
[42] Christian Tomuschat, 'Art 2(3) MN 25' in B Simma, DE Khan, G Nolte, and A Paulus (eds) *The Charter of the United Nations Vol I* (Oxford University Press, 2012), 191.
[43] Manila Declaration (n 5) para. 5. The principle of cooperation is considered later in this Chapter, see section 5.
[44] For instance, the maritime dispute between Turkey and Greece in the Aegean Sea, which has acquired a new dimension in the Mediterranean after delimitation agreements between Turkey-Libya and Greece-Egypt.

Nonetheless, even in those situations where parties only seem to agree on the points of disagreement, other principles govern their conduct and apply to disputed maritime areas. However, this does not mean that the principle of peaceful settlement of dispute ceases to apply.

4 Principle of non-aggravation of dispute and/or mutual restraint

The principle of non-aggravation, or mutual restraint, is an important part of international law's vision for the peaceful resolution of disputes or maintenance of international peace and security.[45] The Manila Declaration adopted by the UN General Assembly requires that states do not take "any action whatsoever which may... impede the peaceful settlement of the dispute".[46]

Articles 74(3) and 83(3) of the LOSC contain a specific application of this principle of mutual restraint and/or non-aggravation pending settlement in relation to the exclusive economic zone and the continental shelf. The Convention requires parties "not to jeopardise or hamper the reaching of the final agreement" pending the settlement of the maritime boundary disputes.[47] The principle, and the obligation in articles 74(3) and 83(3) of the LOSC, is, therefore, one of conduct. Both concern omission of certain types of behaviour and acts.

While there is not a comparable and specific obligation in the LOSC for territorial sea and mixed disputes as there is for the EEZ and continental shelf, the general principle of non-aggravation should also apply to territorial sea and mixed disputes.[48] Indeed, the necessity of showing of restraint is implicit in the provision concerning the delimitation of the territorial sea which prohibits the extension of territorial sea beyond the median line.[49] If a state unilaterally extends its territorial sea in the context of a

[45] The terms non-aggravation and mutual restraint is used interchangeably in this thesis.
[46] Manila Declaration (n 5) para 8.
[47] Articles 74(3) and 83(3) of the LOSC.
[48] Rainer Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78 *The American Journal of International Law* 345, 367.
[49] Article 15 of the LOSC.

dispute concerning its delimitation with another state, that would be contrary to the principle of non-aggravation and mutual restraint.

The arbitral tribunal in *South China Sea Arbitration* made interesting findings on the matter of the duty of non-aggravation or extension of a dispute during judicial proceedings.[50] First, there is "a duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute".[51] According to the tribunal, the duty of non-aggravation flows from two sources: (a) by virtue of being a principle of international law[52] and (b) by the virtue of the LOSC.[53] According to the Tribunal the duty:

> to abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and in general, not allow any step of any kind to be taken which might aggravate or extend the dispute constitutes a *principle of international law* that is applicable to States engaged in dispute settlement *as such*.[54]

According to the arbitral tribunal, the duty not to aggravate "stems from the purpose of dispute settlement" independent from any specific order from a court or tribunal to refrain from such aggravating action.[55] In this connection, provisional measures directing a party or parties to refrain from actions that would aggravate or extend the dispute do not impose "a new obligation", but rather "recall[s]… an obligation that already exists by virtue of their involvement in the proceedings".[56] According to the

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[50] According to the tribunal, China's dredging, artificial island building, and construction activities aggravated and extended the following disputes between the parties, during the course of the proceedings: (a) dispute concerning their respective rights and entitlements; (b) dispute concerning protection and preservation of the marine environment; (c) dispute concerning the status of maritime features in the Spratly Islands and their capacity to generate entitlements to maritime zones, *South China Sea Arbitration (Award)* paras 1176-81.
[51] *South China Sea Arbitration (Award),* para 1169.
[52] Applicable as "other rules of international law not incompatible with this Convention" pursuant to article 293 of the LOSC; *South China Sea Arbitration (Award)* para 1173.
[53] Ibid, para 1172.
[54] *South China Sea Arbitration (Award)* para 1173 [emphasis added].
[55] Ibid, para 1169.
[56] Ibid.

Tribunal, principle of non-aggravation is inherent in the central role of good faith in the international relations between States.[57]

Second, the Tribunal observed that "[n]either the Convention nor international law, go so far as to impose a legal duty on a State to refrain from aggravating generally their relations with one another, however desirable it might be for States to do so".[58] The result of this is that a state's actions would not be covered by the duty of non-aggravation if the actions do not have a specific nexus with the rights and claims making up a 'pre-existing dispute'.[59] According to Steve Ratner, this dictum should be read narrowly.[60] He finds, for pragmatic and normative reasons[61], the interpretation of term 'dispute' problematic; where there is no pre-existing dispute, the non-aggravation duty does not apply in that situation. He suggests that the term 'dispute' covers any significant disagreements between relevant states.[62] While there is normative value to his argument, as certain grave actions may escape consequences because of a narrow interpretation of the term dispute, the distinction between dispute and mere tense political situation is not without significance. As jurisprudence of the ICJ confirms, a dispute arises when a state address specific legal claims of the other state, which then the latter state rejects.[63]

In the context of most disputed maritime areas, there is little doubt over the existence of a dispute and as such, states' actions shall comply with the principle of non-aggravation. While the discussion above concerns the application of the principle in the process of dispute settlement proceedings, the principle still has application in

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[57] *South China Sea Arbitration (Award)* para 1171.
[58] Ibid, para 1174.
[59] *South China Sea Arbitration (Award)* para 1174.
[60] Steven Ratner, 'The Aggravating Duty of Non-Aggravation' (2020) 31 *European Journal of International Law,* 1307, 1327.
[61] Ibid, 1326-1327. From a practical point of view, there are no interstate relations with absolute baseline of no disputes and normatively significant aggravating acts would otherwise be left out, giving states initiating a dispute 'free pass' (gives the example of Russia's encouragement of ethnic Russians in Crimea to split off from Ukraine).
[62] Ratner (n 61) 1327.
[63] *South West Africa Cases (Ethiopia v South Africa; Liberia v. South Africa)* (Preliminary Objections, Judgment) ICJ Reports 1962, p. 328; *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6, para 90.

international disputes, in general, as underlined by the General Assembly in its Friendly Relations Declaration, which states that:

> States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.[64]

It is reasonable to argue that the initiation of dispute resolution processes is not a pre-condition for the application of the principle of non-aggravation in the context of a dispute between states. This is of course explicit in articles 74(3) and 83(3) of the LOSC, concerning the EEZ and continental shelf, but the principle of non-aggravation also applies to the territorial sea and mixed disputes. This is a favourable interpretation in the case of disputed maritime areas, especially where there is little pull for settlement of the dispute, as the principle of non-aggravation serves to prevent mounting tension, mistrust, and animosity between parties. It may even be a catalyst for cooperation between states, as states are more likely to cooperate on how to manage their disputed maritime areas where both parties are following principled behaviour. At the least, when disputing states act with necessary restraint pursuant to the principle, the likelihood of circumstances of threat or use of force, violation of Article 2(4) of the UN Charter, diminishes.[65]

The threat or use of force is clearly contrary to the principle of non-aggravation in the context of a dispute, as well as violating one of the principal rules of international law under the UN Charter. However, when acts do not involve force, whether the act is aggravating or not is context dependent. Lagoni has discussed an example of an aggravating act in the context of a dispute over maritime boundaries. According to his example, if a state enters into negotiations to delimit maritime areas (he refers particularly to territorial sea) because mineral reserves were found in the area, and then exhausts those reserves during the negotiation process, the state in question

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[64] Friendly Relations Declaration (n 6).
[65] For instances, in the lead up to the CGX Incident between Guyana and Suriname, the parties failed to observe the principle of non-aggravation (This thesis considers the case between the parties before the arbitral tribunal in Chapter IV).

would be in breach of the principle of non-aggravation.[66] While his example of exhausting mineral reserves during the negotiation process seems extreme, it could be argued that engaging in exploration with an intent to exploit, or exploitation, of mineral reserves in a disputed maritime area while parties are negotiating a boundary agreement to delimit their entitlements would be contrary to the principle of non-aggravation, and also the principle of good faith. While it seems unlikely that a state can exhaust those reserves right away, engagement with the exploitation of such reserves, depending on the response of the other disputing state, may aggravate the dispute between parties regarding the delimitation of their maritime areas. Support for this view is available in the jurisprudence concerning articles 74(3) and 83(3) of the LOSC, which this section now turns to consider.

In the case of *Guyana v. Suriname,* the issue was whether the parties breached the obligation not to jeopardise or hamper the reaching of the final agreement by their actions and activities in relation to the disputed maritime area.[67] The Arbitral Tribunal regarded this duty as "an important aspect of the Convention's objective of strengthening peace and friendly relations between nations and of settling disputes peacefully".[68] The Tribunal held that unilateral exploratory drilling by Guyana in the disputed maritime area jeopardised and hampered the final agreement, due to the physical changes that such acts engender to the marine environment.[69] It is implicit in the judgment of the Tribunal that the opposition of Suriname to the said activity was also a factor in the decision of the Tribunal.[70] The Tribunal concluded that Suriname also breached the obligation not to jeopardise or hamper, while at the same time threatening international peace and security, by threatening to use force in a disputed area – undertaken as a reaction to the exploratory drilling of Guyana.[71]

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[66] Lagoni (n 48) 362.
[67] A context specific application of the general principle of non-aggravation and mutual restraint between parties to a dispute, pursuant to Article 74(3) and 83(3) of the LOSC.
[68] *Guyana v. Suriname*, para 465.
[69] Ibid, para 480.
[70] See the language employed by the Tribunal, for example, para 480: "such activities *could be perceived to*, or may genuinely, prejudice the position of the other party to the delimitation dispute, thereby both hampering and jeopardising the reaching of a final agreement" and also para 481: "both Parties authorised concession holders to undertake seismic testing in disputed waters, and these activities *did not give rise to objections* from either side. *In the circumstances at hand*, the Tribunal does not consider that unilateral seismic testing is inconsistent with a party's obligation to make every effort not to jeopardise or hamper the reaching of a final agreement" [emphasis added].
[71] *Guyana v. Suriname* para 484.

As a contextual application of the principle of non-aggravation or mutual restraint, the findings of the Arbitral Tribunal in relation to the obligation not to jeopardise or hamper demonstrate, by analogy, that there are certain activities and actions that are contrary to the principle of non-aggravation. However, it is not possible or desirable to come up with an exhaustive list of aggravating acts as different factors may weigh differently in each case. As can be seen in the decision of *Guyana v. Suriname,* drilling by Guyana breached the obligation not to jeopardise or hamper because of two factors: (a) the change it engenders to the marine environment, and (b) objections of Suriname to the said activity.

The principle of non-aggravation is an important part of the normative framework which guides state behaviour in disputed maritime areas. The principle acts as a reminder to states to ensure that they do not engage in acts that would aggravate the dispute further, pending any potential future settlement. Conceived in this negative way, the principle of non-aggravation or mutual restraint intended to restrain certain behaviour, for instance, the use or threat of force to secure ends sought.[72] On that note, this chapter turns to the principle of cooperation which holds an important place in the normative framework.

5 Principle of cooperation

International cooperation to solve problems of an economic, cultural, or humanitarian character is set out as one of the purposes of the UN as an international organisation in Article 1(3) of the Charter. Chapter IX of the Charter is dedicated to issues of 'international economic and social cooperation' reiterating that all members "pledge themselves take joint and separate action in co-operation…for the achievement of the purposes set forth in Article 55".[73] Similar to other core principles of international law, the Friendly Relations Declaration has reaffirmed this general duty to cooperate in accordance with the UN Charter in the maintenance of international peace and security and for the promotion of economic stability, progress and general welfare of the nations.[74] Neither the

[72] Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens, 1964), p. 62.
[73] Article 56 of the UN Charter.
[74] Friendly Relations Declaration (n 6).

Friendly Relations Declaration nor the UN Charter define specific content of the duty to cooperate.[75] What is more, this initial reference to the principle of cooperation in the UN context mostly concerns the sphere of international peace and security. Subsequently, as discussed below, the principle of cooperation expanded to other spheres as various legal instruments began relying on the principle to respond to complex challenges in different fields such as, human rights, environment, and natural resource governance etc.

The role of the principle of cooperation is magnified at the international level, as the aims and values of the international community can no longer be realised unilaterally and require collective effort and action of states. It is no surprise that one of the most striking developments of the principle is within the sphere of international environmental law. For example, as early as 1978, UNEP's draft principles of conduct urge states to cooperate for the conservation and harmonious utilisation of shared natural resources.[76] Principles 5, 6, and 7 of the draft principles express more specific commitments such as, exchange of information, consultation and notification.[77] Principles 3 and 4 urge states to prevent transboundary harm and conduct environmental impact assessments (EIA).[78] The Stockholm and Rio Declarations provide for cooperation as a tool of achieving objectives relating to the environment. According to Principle 24 of the Stockholm Declaration:

> [i]nternational matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing. Cooperation ... is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.[79]

According to Principle 27 of the Rio Declaration:

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[75] Laurence Boisson de Chazournes and Jason Rudall, 'Cooperation' in Viñuales (n 13) 108-109.
[76] United Nations Environment Program: Governing Council approval of the report of the intergovernmental working group of experts on natural resources shared by two or more states (1978) 17 *International Legal Materials,* 1091, 1098, principle 1 (hereinafter 'UNEP draft principles').
[77] Ibid.
[78] UNEP draft principles (n 76).
[79] Stockholm Declaration (n 7).

> States and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.[80]

Environmental objectives, especially in a transboundary context, can be undertaken either through bilateral cooperation or multilateral cooperation. The principle of cooperation is an essential component of the LOSC. The Convention, including its preamble, mentions the term 'co-operation' 36 times. Part XII of the LOSC, which is concerned with 'Protection and Preservation of the Marine Environment', provides that states shall either undertake bilateral cooperation or multilateral cooperation (either global or regional) to further develop international rules, standards and recommended practices for the protection and preservation of the marine environment.[81] In the management and conservation of shared/transboundary fish stocks, states are required to cooperate either bilaterally or multilaterally, for example, through regional fisheries management organisations (RFMOs).[82] Moreover, the LOSC reiterates the importance of cooperation for states bordering an enclosed or semi-enclosed sea for the exercise of their rights and performance of their duties under the Convention.[83] In particular, the Convention provides that such states shall endeavour to cooperate either bilaterally or through a multilateral regime for issues such as management of living resources, protection and preservation of the marine environment etc.[84]

The case law also reflects the significance of the principle of cooperation for the LOSC. In the *MOX Plant* case before ITLOS, the Tribunal reiterated that "the duty to co-operate is a fundamental principle in the prevention of pollution of marine environment under Part XII of the Convention, and general international law".[85] Similarly,

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[80] Rio Declaration (n 8).
[81] Article 197 of the LOSC.
[82] Article 63 of the LOSC; UNFSA, Article 8.
[83] Article 123 of the LOSC. According to article 122 of the LOSC: enclosed or semi-enclosed sea means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.
[84] Article 123 (a) and (b) of the LOSC.
[85] *MOX Plant* (Provisional Measures) para. 82.

international courts and tribunals have underlined the fundamental nature of the principle of cooperation in international law in numerous other cases. For example, ITLOS in the *Southern Bluefin Tuna* cases,[86] the case *Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*[87] and *the Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*,[88] and by the ICJ in *Pulp Mills.*[89]

Indeed, the principle of cooperation also forms the backbone of the obligations incumbent upon states in disputed maritime areas. According to articles 74(3) and 83(3) of the LOSC, states concerned "in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements".[90] If one of the parties wishes to undertake certain activities such as installation of structures to generate energy, or wish to impose a seasonal fishing ban to improve stocks, the other disputing state should be given notice, and offered to participate in the activities in order to give effect to the principle of cooperation.[91] In addition to bilateral cooperation in disputed maritime areas, given the broader interests involved in the protection and preservation of the marine environment and conservation and management of living resources, multilateral cooperation is also of particular importance. This thesis discusses the added value of multilateral cooperation for the management of disputed maritime areas.[92] Such cooperation must be carried out in good faith, which is another principle applicable to the governance of disputed maritime areas.

6 Principle of protection and preservation of the marine environment

As previously pointed out, 'governance' of disputed maritime areas necessitates moving beyond the lens of the disputing states (bilateral legal dispute and obligations) as there are other interests involved within the broader context, i.e., third parties and

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[86] *Southern Bluefin Tuna cases (New Zealand v Japan; Australia v Japan),* Provisional Measures, ITLOS Order of 27 August 1999, p. 280, 293-294, para. 48.
[87] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 25, para. 92.
[88] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC),* ITLOS Advisory Opinion of 2 April 2015, p. 68, para 219.
[89] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, ICJ Reports 2010, p. 14 para 77.
[90] Article 74(3) and 83(3) of UNCLOS.
[91] *Guyana v. Suriname*, para 477.
[92] See, Chapter V.

the international community. This is particularly pertinent in relation to issues surrounding the marine environment because degradation of the marine environment has ramifications for the well-being of the ocean, its biodiversity, and ecosystems, and therefore, is a collective concern of the international community. As such, obligations concerning the protection of the environment, including the marine environment, are generally owed either to all States parties to a treaty (*erga omnes partes*) or to the community of states (*erga* omnes).[93] *Erga omnes* obligations are those that a state owes to the international community as a whole and all states have a legal interest in their performance.[94]

Given the physical characteristics of the marine environment, such as the movement of living resources between different maritime areas, and the spread of effects of anthropogenic activities between and beyond national jurisdictions, which implicate a broad range of interests, it is not surprising that the LOSC dedicates Part XII to this issue. According to article 192 of the LOSC all "[s]tates have the obligation to protect and preserve the marine environment".[95]

The substantive obligation of protection and preservation under article 192 of the LOSC require protection of marine environment from future damage and maintenance and improvement of its current condition.[96] Furthermore, the principle of environmental protection and preservation not only entails a negative obligation such as not to degrade the marine environment, but also a positive obligation, requiring active measures to satisfy the obligation to preserve the marine environment.[97] It is important to note that marine environment refers to "the all-encompassing living and non-living marine nature, its ecosystems and components".[98] Protection and preservation of marine environment under the LOSC include all forms and sources of marine pollution,

[93] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International law and the environment* (Oxford University Press 2009) 130-131.
[94] *Barcelona Traction Case* (Judgment), ICJ Reports 1970, p. 3, para 33.
[95] Article 192 of the LOSC.
[96] *South China Sea Arbitration* (*Award)* para 491.
[97] Ibid.
[98] Detlef Czybulka, Article 192, MN 25, in Alexander Proelss, *UNCLOS: A commentary* (Beck, Hart, and Nomos 2017).

indeed most provisions in Part XII relate to pollution[99], conservation of marine living resources[100] and protection of ecosystems and biodiversity.[101]

Besides this substantive obligation to protect and preserve the marine environment, states have numerous procedural obligations, which has developed over the years both in the jurisprudence of international courts and tribunals and in various instruments that have entered into force since the adoption of the LOSC.[102] One of these being the duty to conduct an environmental impact assessment (EIA). According to the United Nations Environmental Programme (UNEP), EIA is "the process of identifying, predicting, interpreting and communicating the potential impacts that a proposed project or plan may have on the environment".[103] Principle 17 of the Rio Declaration provides that EIA "shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment".[104] The duty of states to carry out EIA was confirmed by the ICJ in the *Pulp Mills* case. According to the judgment in the case:

> [A] practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[105]

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[99] See Articles 194-196 and 207-212 of the LOSC.
[100] *Southern Bluefin Tuna Cases,* (Provisional Measures) para 70.
[101] Article 194(5) of the LOSC; Arbitral Tribunal in Chagos MPA Arbitration rejected that Part XII is limited to anti-pollution approach, see PCA, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* Award of 18 March 2015, paras 319-320, available at PCA website: https://pca-cpa.org/en/cases/11/ (hereinafter '*Chagos MPA Arbitration'*)
[102] Notably, some of the procedural obligations were already available in LOSC, in looser terms and in a more limited context, see article 206 of the LOSC.
[103] Goals and Principles of Environmental Impact Assessment of the United National Environmental Programme, December 1987 (UN Doc. UNEP/WH.152/4 Annex).
[104] Rio Declaration (n 8).
[105] *Pulp Mills (Argentina v. Uruguay)*, para 204.

Similarly, ITLOS Seabed Disputed Chamber, in its advisory opinion, reiterated that the duty to conduct an EIA is a general obligation under customary international law.[106] In the context of marine environmental protection, the duty to conduct and EIA and monitoring are provided for in articles 204, 205 and 206 of the LOSC. Article 204(1) prescribes that States shall endeavour, as far as practicable, to observe, measure, evaluate and analyse the risks or effects of pollution of the marine environment. The dynamic nature of the natural environment calls for adaptive management as it is the way forward for "environmental regulation and management to remain functional in the fact of climate change" and other environmental challenges "is for those regulatory and management systems to become adaptive".[107] These feed into the point made earlier in the Introduction in relation to the dynamic nature of disputed maritime area governance. Changing environmental circumstances in disputed maritime areas may call for different approaches at different time periods. Existing provisional arrangements (see Chapter III) between states may have to be revised to adapt to environmental changes, or other changes, such as political and social. Furthermore, states shall keep under surveillance the effects of any activities which they permit or in which they engage to determine whether such activities are likely to pollute the environment.[108] As complementary to this obligation, states shall publish reports of the results obtained to international organisations, which are to make them available to all States, by the virtue of article 205 of UNCLOS. Article 206 enshrines the duty to carry out an assessment of the potential effects, i.e., EIA, of planned activities when there are "reasonable grounds for believing" that substantial pollution or significant and harmful changes to the marine environment may result therefrom and communicate the results as per article 205.[109] Failure to communicate results from an EIA amount to a breach of the obligation under these articles.[110]

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[106] *Responsibilities and obligations of States with Respect of Activities in the Area,* (Advisory Opinion), 1 February 2011, ITLOS Reports 2011, p.10, para 145. The requirement to undertake an EIA has been incorporated into international, regional, and national legal instruments, *see* Convention on Environmental Impact Assessment in a Transboundary Context, Espoo (adoption 25 February 1991, entry into force 10 September 1997) 1989 *UNTS* 309.
[107] Eric Biber, 'Adaptive Management and the Future of Environmental Law' (2013) 46 *Akron Law Review*, 933-962, 935.
[108] Article 204(2) of the LOSC.
[109] Article 206 of the LOSC.
[110] *South China Sea Arbitration (Award)* para 991.

Last but not least, a precautionary approach has been called for in marine environmental protection. According to Principle 15 of Rio Declaration states shall apply precautionary approach in order to protect the environment, meaning that when there are risks of serious or irreversible damage, measures to prevent environmental degradation shall not be postponed due to lack of full scientific certainty.[111] Although the LOSC does not refer to the precautionary approach/principle since it post-dates the Convention, this approach has gained some traction in a number of international instruments and decisions of international courts and tribunals. For example, in *Southern Bluefin Tuna* cases ITLOS considered an application for provisional measures from New Zealand and Australia against Japan. While the Tribunal did not explicitly employ a precautionary approach, it seemed inherent in the way that Tribunal has ordered parties to refrain from experimental fishing.[112] ITLOS considered that in light of the "scientific uncertainty" regarding measures to be taken to conserve southern bluefin tuna stocks, "the parties should in the circumstance act with *prudence* and *caution* to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna".[113]

For states, the issue of sovereign rights and jurisdiction in disputed maritime areas has been the main concern whereas issues of environmental risks and harm posed by activities, such as petroleum drilling, construction of artificial islands and fishing, seem subordinate. However, marine environmental risks are real and urgent, requiring active measures, especially in areas of vulnerable ecosystems and the habitats of endangered species. According to the Tribunal in the *South China Sea Arbitration* "[the] marine environment around Scarborough Shoal and the Spratly Islands has an extremely high level of biodiversity of species, including fishes, corals, echinoderms, mangroves, seagrasses, giant clams, and marine turtles, some of which are recognised as vulnerable or endangered".[114] The Tribunal also underlined that the impact of any environmental harm in these locations "can affect the health and viability of ecosystems elsewhere in the South China Sea".[115] The fact that the areas

[111] Rio Declaration (n 8).
[112] See, Sep. Op. of Judge Treves in *Southern Bluefin Tuna Cases* (Provisional Measures) para 8.
[113] *Southern Bluefin Tuna* (Provisional Measures), paras 77 and 79 [emphasis added].
[114] *South China Sea Arbitration (Award)* para 823.
[115] Ibid, para 825.

concerned were disputed did not affect the application of relevant rules in the LOSC. Rather, the tribunal clarified that "because the environmental obligations in Part XII apply to States *irrespective of where the alleged harmful activities took place*, [the Tribunal's] jurisdiction is not dependent on the question of sovereignty over any particular feature… or on the *prior delimitation of any overlapping entitlements*".[116] The environmental obligations in the LOSC contain no qualifications and cover the ocean as a whole, without making any distinction in relation to EEZ or continental shelf, disputed maritime areas or areas not under dispute. In the words of the Tribunal in *South China Sea Arbitration,* "the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas…[t]he Tribunal's findings… are not in any way dependent upon, which State is sovereign over features in the South China Sea".[117] This is an important clarification of law applicable in disputed maritime areas in the field of marine environmental protection.

These rules in the LOSC are arguably illustrative of a broader principle of customary international law. Thus, according to a report of the UN Secretary-General to the General Assembly, article 192 of the LOSC is a statement of customary international law on the environmental responsibility of states toward the oceans.[118] Furthermore, the absolute and unqualified language used in the article reflects the importance placed on the issue by the international community.[119] For example, the preamble of the 1992 OSPAR Convention expressly refers to "the relevant provisions of customary international law reflected in Part XII of the United Nations Law of the Sea Convention, and in particular, Article 197, on global and regional cooperation for the protection and preservation of the marine environment".[120] It is also worth noting that OSPAR Convention is one example of a treaty that has been adopted under the umbrella of Part XII of the LOSC which requires that states parties cooperate on a global and/or regional basis to elaborate and formulate "international rules, standards and

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[116] *South China Sea Arbitration (Award)* para 927 [emphasis added].
[117] Ibid, para 940.
[118] UNGA, Protection and preservation of the marine environment, Report of the Secretary General at the forty-fourth session (18 September 1989) UN Doc. A/44/461, para 29, available online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N89/202/76/IMG/N8920276.pdf?OpenElement
[119] Ibid.
[120] Convention for the Protection of the marine environment of the North-East Atlantic (adoption 22 February 1992, entry into force 25 March 1998) 2354 *UNTS* 67 (hereinafter 'OSPAR Convention').

recommended practices and procedures" for the protection and preservation of the marine environment.[121]

It is also noteworthy that in cases concerning disputed maritime areas states have not argued that they are not bound by the environmental protection obligations under the LOSC and customary international law. Rather, the disputing states have challenged the efficacy and adequacy of the steps taken, or not taken at all, by the other state to protect and preserve the marine environment in disputed maritime areas. For example, in *Ghana v. Côte d'Ivoire* provisional measures[122] proceedings before ITLOS, Côte d'Ivoire argued that "oil-related activities being carried out today on behalf of and in the name of Ghana, whether in or near the disputed area, have already given rise to pollution incidents" and "that Ghana's lack of due diligence is highlighted by its failure to monitor oil activities effectively and the shortcomings in its legislative framework".[123] While Ghana responded that there has not been an oil pollution incident resulting from its activities and that its "environmental protection legislation is among the most robust in the region".[124] However, ITLOS did not rule on the matter directly but rather stated that Côte d'Ivoire did not provide enough evidence to support its allegations.[125] Similarly, though China did not participate in the arbitration proceedings in *South China Sea Arbitration*, the Tribunal inferred the position of China from some official statements.[126] According to documents examined by the Tribunal, China did not deny its environmental obligations but claimed to be honouring its obligations in good faith in response to the Philippines' allegations of harmful fishing practices and harvesting of endangered species, and that "China's construction projects on the islands and reefs have gone through scientific assessments and rigorous tests".[127]

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[121] Article 197 of the LOSC.
[122] *Delimitation of the Maritime Boundary in the Atlantic Ocean* (*Ghana v. Côte d'Ivoire*), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 146
[123] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 65.
[124] Ibid, para 66.
[125] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 67.
[126] *South China Sea Arbitration (Award)* para 912.
[127] Ibid, paras 915, 917 and 919.

7 Principles in Context

It is useful here to consider the role of principles of governance in a particular hypothetical case of disputed maritime areas to discuss their relevance in different phases of a dispute as well as the link between different principles. The principles are important in the context of disputed maritime areas because their role is to ensure limit any tension mounting, facilitate orderly exercise of rights and use of the disputed maritime area as well as fostering friendly relations which may positively contribute to successful settlement of the dispute. This section will consider the relevance of different principles in different phases of dispute, namely, when the dispute arises, pending settlement and during settlement of the dispute, in doing so this section will discuss how principles are interlined.

When it becomes clear that there exists a disputed maritime area between two or more states, in this context principle of peaceful resolution of disputes is relevant. This governance principle's implication is that both states should not resort to any conduct that would involve threat or use of force or other means of coercion to settle the dispute. For example, actions such as heavily policing a proposed maritime boundary with coast guard vessels or navy to coercively enforce a boundary not agreed by other party would be contrary to principle of peaceful resolution of disputes. In this regard, principle of non-aggravation's link and relevance becomes clear to this specific situation: such coercive attitude, akin to might makes right, may trigger a similar naval response from the other party which may erupt into a dangerous situation threatening international peace and security.

Pending settlement, especially where parties are not in actively engaging with each other in relation to settlement of the dispute or where dispute settlement is protracted and taking a long time, other principles are relevant for states. For example, let us consider the relevance of the governance principles in a scenario where there is significant IUU fishing in the disputed maritime area by third party vessels. The principle of non-aggravation/mutual restraint would necessitate states to avoid friction and deterioration of the dispute because of exercise of enforcement powers in a known disputed area. As this is a situation where coastal states have an obligation and jurisdiction to address IUU fishing in their maritime zones, principles of cooperation

and good faith are relevant in this context as they relay best course of action. The principle of cooperation would point states to consult to reach an arrangement in relation to how to address IUU shipping, including any enforcement activities. Principle of good faith in this context is linked to the principle of cooperation and would mean that states need to openly approach such consultations and make every effort to find a modus operandi. At a minimum, both of these principles promote transparency in the actions taken towards fishing vessels, including open communication and invitations to participate/observe in the operations of each other.

In the dispute settlement phase, whether that is settlement before an international court or tribunal or any other peaceful means of dispute settlement found in article 33 of UN Charter, parties are giving effect to the principle of peaceful resolution of disputes. If parties are engaged in negotiations or mediation, as discussed earlier in this chapter, principle of good faith would mean that states are to pursue them with an intent to reach an agreement, making concessions and renewing proposals as appropriate. Furthermore, principle of good faith is interlinked in this context with principle of non-aggravation. They are two sides of the same coin: one requires positive action and the other refrainment from negative action. To continue with the scenario discussed above, if parties are in the process of negotiations to settle dispute or before a court or tribunal, unilaterally taking enforcement action in disputed maritime areas would be contrary to the philosophy of the principle of non-aggravation/mutual restraint.

8 Conclusion

This chapter has considered relevant fundamental principles of international law and their application in the context of disputed maritime areas. These principles make up part of the normative framework that applies to disputed maritime areas, pending future settlement. The role of principles in disputed maritime areas is central because the rights and interests of states and third parties, including those of the international community, co-exist. As discussed in the introduction to this thesis, challenges of disputed maritime areas necessitate that states manage such areas based upon principles to ensure the orderly exercise of rights and proper management of natural

resources and the marine environment in accordance with their obligations *erga omnes.*

Selection of the principles for disputed maritime areas naturally flows from the nature of disputed maritime areas and the rights and a broad range of interests involved in their governance. The existence of a 'dispute' necessitates observation of principles of peaceful resolution of disputes and non-aggravation. In addition to the principles that flow from the existence of a dispute between parties concerned, the principle of cooperation is of utmost importance for the management of disputed maritime areas. It facilitates the balancing of different rights and interests involved in the implementation rules concerning, for example, natural resource governance and protection and preservation of the marine environment. The principle of protection of the marine environment deemphasises the bilateral (state-to-state) aspect of disputed maritime areas and emphasise the broader context and interests involved in such concerns, and the role of multilateral institutions in achieving the objectives of protection and preservation of the marine environment, and as such, contributing to the management of disputed maritime areas.[128]

The framework presented here applies to all states and disputes given the general character of the principles discussed. While some of these principles reflect negative obligations of abstention of certain behaviours (principle of non-aggravation), others are positive in nature, for example, principle of cooperation. In other words, we can categorise these principles as ones that circumscribe the conduct of states in disputed maritime areas[129] and others that enable concerted action.[130] While some of the other principles call for consideration different approaches, such as considering the role of the adjudicative institutions[131] and other third party dispute settlement[132] (in the context of the principle of peaceful settlement of disputes) and multilateral

[128] See, Chapter V.
[129] See the discussion in Chapter IV concerning the obligation not to jeopardise or hamper the final agreement.
[130] See the discussion in Chapter III concerning the obligation to make every effort to enter into provisional arrangements.
[131] See Chapter VI.
[132] See Chapter VII.

institutions[133] (principles of protection and preservation of the marine environment and cooperation).

[133] See Chapter V.

Chapter III: Bilateral Provisional Arrangements

1 Introduction: merits of provisional arrangements

This chapter addresses cooperative provisional arrangements. One of the governance principles, as discussed Chapter II, is cooperation in disputed maritime areas. In addition to the principle, there is also a rule on cooperation in the LOSC. The Convention places an obligation on states to make their best efforts to negotiate provisional arrangements pending delimitation of their EEZ and continental shelf boundaries, which is set out in paragraph 3 of articles 74 and 83 of the LOSC.[1] As such, the LOSC favours provisional arrangements as a means of governing disputed maritime areas. However, the obligation to enter into provisional arrangements is not an obligation of result, but one of conduct. The literature approaches provisional arrangements, especially joint development, with great enthusiasm and debates in detail the benefits of such arrangements.[2]

In principle, provisional arrangements appear ideal for maritime areas by providing a means of moving beyond or setting aside the dispute to address and overcome jurisdictional uncertainties, in a manner that allows for the management of maritime spaces and resources. In this connection, the LOSC reassures states that such arrangements "shall be without prejudice to the final delimitation".[3] As we shall see below, most states include, in addition to the assurance in the LOSC, 'without prejudice' clauses in their provisional arrangement agreements to ensure cooperation is without compromise to their claims.

It is useful to consider at the outset some of the reasons why provisional arrangements are normatively and pragmatically attractive for disputed maritime areas. First, of particular importance is that entering into a provisional arrangement is consistent with

[1] Articles 74(3) and 83(3) of the LOSC.
[2] For example, see, Constantinos Yiallourides, *Maritime Disputes and International Law: Disputed Waters and Seabed Resources in Asia and Europe* (Routledge, 2019); Robert Beckman, Ian Townsend-Gault, Clive Schofield, Tara Davenport, and Leonardo Bernard (eds) *Beyond Territorial Disputes in the South China Sea* (Edward Elgar, 2013).
[3] Articles 74(3) and 83(3) of the LOSC.

the vision and rules of the LOSC. Moreover, entering into provisional arrangements is one way of giving effect to the principles of governance, such as cooperation, discussed in Chapter II.

Second, provisional arrangements can address some of the endemic problems associated with a unilateral approach to disputed maritime areas, which are discussed in the following chapter.[4] By entering into provisional arrangements, states may circumvent those unwelcome consequences, such as poor ocean resource management resulting from jurisdictional uncertainties that lead to the unsustainability of resources either because of uncoordinated policies or due to competition for access to such resources.[5] Moreover, competition for access to resources between disputing states tends to increase confrontations that can lead to the threat or use of force contrary to international law, as seen between Guyana and Suriname.[6] In this connection, provisional arrangements are also a tool for conflict prevention, as working cooperatively on issues concerning both sides can be a form of confidence building between states.[7] Therefore, provisional arrangements are attractive as they may allow pragmatic development or management of the resources or the marine environment in the disputed maritime area without having to wait years for delimitation. In this context, it is argued that provisional arrangements provide a functional response to mutual resource management concerns.[8] Another benefit of entering into a cooperative provisional arrangement is that states will be able to pool their management capabilities.[9] This is especially advantageous when the technical, financial, and human resources required for management are scarce or asymmetrical.[10]

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[4] See Chapter IV on unilateralism.
[5] However, entering into provisional arrangements is not a guarantee of good ocean governance in disputed maritime areas. See the discussion in section 5 of this chapter below.
[6] See, *Guyana v. Suriname*.
[7] Ian Townsend-Gault, 'Rationales for zones of co-operation' in Beckman et al (n 2) 129.
[8] WG Stormont and I Townsend-Gault, 'Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?' in Gerald H Blake et al (eds) *The Peaceful Management of Transboundary Resources* (Graham and Trotman, 1995) 51– 76, 70.
[9] Townsend-Gault (n 7) 128.
[10] Clive Schofield 'No Panacea? Challenges in the application of provisional arrangements of a practical nature' in M Nordquist et al (eds) *Maritime Border Diplomacy* (Brill, 2012) 151-169, 156-157.

Finally, yet importantly, as we shall see below, provisional arrangements offer great flexibility to states. States have a great degree of discretion in terms of content, duration, and geographical scope etc. In practice, states have entered into diverse provisional arrangements pending delimitation, be it in relation to living or non-living resources or other non-resource-related arrangements. However, in saying that, joint development of hydrocarbons is the most common because of, what the literature has termed, 'the oil imperative', which refers to economic incentives for states.[11] Writing in the first half of the 2010s, Beckman et al considered that the demand and the need for hydrocarbons continue to increase especially with regards to oil in East and South East Asia in particular.[12] This need for securing energy resources has been the key driver of cooperative joint development in that region. However, since then the call for energy transition intensified as the Intergovernmental Panel on Climate Change (IPCC)[13] urges immediate action to remove carbon dioxide from the atmosphere alongside significant reductions of greenhouse gas emissions which necessitates that energy production and consumption move away from fossil fuels to zero-carbon and renewable energy sources. In this context, states should consider alternatives to joint hydrocarbon development arrangements, in disputed maritime areas, such as wind and wave energy.

Given this positive outlook, this chapter aims to examine provisional arrangements for the management of disputed maritime areas. In doing so, this chapter considers the rule in the LOCS (one of the pillars of governance discussed in Chapter I), and following that discussion, this chapter considers examples of arrangements that can be entered into. First, this chapter introduces some of the controversies surrounding the adoption of this obligation at the Third UN Conference on Law of the Sea (UNCLOS III). Second, this chapter considers the nature of the obligation to enter into provisional arrangements under the LOSC. Third, this chapter considers some examples of provisional arrangements, highlighting the different types of arrangements that states can enter into in managing their disputed maritime areas.

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[11] Beckman et al, 'Factors conducive to joint development in Asia – lessons learned for the South China Sea' in Beckman et al (n 2) 293-295.
[12] Ibid.
[13] Joeri Rogelj et al, 'Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development' in Valerie Masson-Delmotte et al (eds) *Global Warming of 1.5°C* (Cambridge University Press, 2018) 93-174, 159, 161. https://doi.org/10.1017/9781009157940.004

Fourth, this chapter identifies and discusses some of the challenges and the limitations of provisional arrangements based on the discussion in the earlier section. Finally, this chapter will provide some concluding thoughts on provisional arrangements.

2 Controversies over provisional arrangements at UNCLOS III

The provisions relating to delimitation and disputed maritime areas were one of the hard-core issues at UNCLOS III that went through a complicated process of compromise before adoption. The resulting consensus offers flexibility to states[14], but the language used has been criticised for being ambiguous.[15] Therefore, it is important to understand these provisions with "reference to the struggle for compromise" at UNCLOS III.[16] This discussion of the drafting history, which illustrates the evolution of the rules during UNCLOS III, is, therefore, a helpful precursor to interpreting and understanding the meaning of this obligation, especially what the rules in articles 74(3) and 83(3) of the LOSC say, or rather do not say. While some of the proposals involved clear rules, the adopted rules as seen in articles 74(3) and 83(3) of the LOSC are rather more flexible. This is also in contrast to the clear 'interim solution' for the territorial sea, which provides that states shall not exercise jurisdiction beyond the equidistance line in case of a dispute over the territorial sea.[17]

One of the most contentious issues at UNCLOS III was the rules relating to the delimitation of the EEZ and the continental shelf boundaries, which the Conference allocated to the Second Committee along with other broad topics.[18] The disputed maritime areas were a sub-issue of negotiations on boundary delimitations which was characterised by deep disagreements between states supporting 'equidistance' and those supporting 'equitable principles' as the method of delimitation. Negotiating Group 7 (NG7), one of the groups of limited sizes which were established to deal with

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[14] Natalie Klein, 'Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes' (2006) 21 *The International Journal of Marine and Coastal Law* 423, 444. ("the LOSC…leaves states with considerable discretion in reaching agreement on what temporary measures should be taken").
[15] David Joseph Attard, *Exclusive economic zone in international law* (Clarendon Press, 1987) at 228.
[16] O'Connell cited in Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North Ease Asia* (Martinus Nijhoff 2004) 32.
[17] Article 15 of the LOSC.
[18] Lucius Caflisch, 'The Delimitation of Marine Spaces between States with Opposite and Adjacent Coasts' in Rene-Jean Dupuy and Daniel Vignes (ed), *A Handbook on the New Law of the Sea*, vol I (Martinus Nijhoff Publishers 1991), 425-495, 477.

the outstanding “hard-core” issues by those states with a special interest in the subject, took on the issue of delimitation of the EEZ/continental shelf and the settlement of disputes.[19] The issue of unresolved maritime boundaries, or disputed maritime areas were intertwined and part of the negotiations on maritime boundaries. No consensus on the matter of the delimitation method was reached until 1981, one year before the adoption of the LOSC. [20]

The issue of unresolved maritime boundaries was first raised during the second session in 1974 by Greece. The median line, Greece suggested, should be the boundary where there is no agreement between states – which is adopted as the rule for the territorial sea.[21] The Netherlands made a similar proposal on “interim solutions to be applied pending the final determination of the delimitation lines” reading:

> Pending such agreement neither of the States is entitled to establish its marine boundaries beyond the line, every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each State is measured.[22]

States supporting equitable principles for maritime delimitation did not agree with this proposal including the equidistance and the median line principles.[23] States favouring equitable principles for maritime delimitation were proposing a moratorium on all exploration and exploitation activities in the disputed maritime areas instead of exercising coastal state rights up to the interim median/equidistance line. This position can be seen in a proposal by the Irish delegation:

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[19] Yoshifumi Tanaka, Art 74, MN 4-5 in: Alexander Proelss, *UNCLOS: A commentary* (Beck, Hart, and Nomos 2017).
[20] UNCLOS III, 154th Plenary Meeting, UN Doc. A/CONF.62/SR.154 (28 August 1981). Compromise was reached based on a proposal by Tommy Koh, President of UNCLOS III, which became articles 74(1) and 83(1) of the LOSC.
[21] Greece: draft articles on the continental shelf, UN Doc. A/CONF.62/C.2/L.25 (26 July 1974); Satya N Nadan, Shabtai Rosenne and Neal R Grandy (eds) *United Nations Convention on the Law of the Sea 1982: A Commentary,* Vol II (Martinus Nijhoff 1993), para 74.4 and 83.5.
[22] Netherlands: draft article on delimitation between States with opposite or adjacent coasts, UN Doc. A/CONF.62/C.2/L.14 (19 July 1974) See similar proposal by Japan UN Doc. A/CONF.62/C.2/L.31 /Rev.l. (16 August 1974).
[23] Kim (n 16) 33.

> Pending an agreement for which provision is made in the preceding paragraphs, no State is entitled to carry on exploration or exploitation activities in any areas which are claimed *bona fide* by any other State except with the express consent of that State, provided such a claim is not inconsistent with the principles laid down in this article. [24]

After the third session of the Conference which ended in May 1975, an 'interim solution'[25] appeared for the first time formulated in prohibitive terms in a working instrument – Informal Single Negotiation Text (ISNT) – of the Convention that became the basis of negotiations.[26] The 'interim solution' in the ISNT, Part II, articles 61(3) and 70(3) read as follows: "Pending agreement, no State is entitled to extend its EEZ/continental shelf beyond the median line or equidistance line".[27] At the fourth session, between March to May 1976, the Second Committee studied the ISNT article-by-article, through collective discussion, to ensure the text served the intended purposes and following these discussions, it adopted the Revised Single Negotiation Text (RSNT). During these article-by-article negotiations, the drafters removed references to the median/equidistant line as the 'interim solution' in the common paragraph three, which became articles 62(3) and 71(3) of the RSNT.[28] The Chairman of the Second Committee expressed why the removal of the median/equidistant line references from paragraph three in the RSNT was necessary by remarking that:

> Since the Conference may not adopt a compulsory jurisdictional procedure for the settlement of delimitation disputes, I felt that the reference to the median or equidistant line as an interim solution might not have the intended effect of encouraging agreements. In fact, such reference may defeat the main purport of the article as set out in paragraph 1. Nonetheless, the need for an interim solution was evident. The solution

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[24] Ireland: draft article on delimitation of areas of continental shelf between neighbouring States, UN Doc. A/CONF.62/C.2/L.43 (6 August 1974); Nadan et al (n 21), para 83.5.
[25] In the official documents of the Conference the terms "Interim measures" and "interim solutions" were used meaning measures undertaken in the meantime until the dispute is solved.
[26] Each the three main Committees were delegated with the task of preparing parts of the ISNT.
[27] ISNT, *Official Records of the UNCLOS III,* Vol IV, UN Doc. A/CONF.62/WP.8/Part II (1975) at p.162-163.
[28] RSNT, *Official Records of the UNCLOS III,* Vol V, UN Doc. A/CONF.62/WP.8/Rev.1/Pt.II (1976) Articles 62(3) and 71(3).

was, in my opinion, to propose wording in paragraph 3, which linked it more closely to the principle in paragraph 1.[29]

Paragraph 1 of the delimitation articles provides that maritime boundary "shall be effected by agreement between states".[30] In this connection, the Chairman was concerned that adopting a readily available interim solution, i.e., median/equidistant line, for disputed maritime areas would discourage the reaching of agreed maritime boundaries between states. The revised text reads: "Pending agreement or settlement, the States concerned shall make *provisional arrangements*, taking into account the provisions of paragraph 1".[31] This proposed version gave coastal states the discretion to agree on their own 'interim solutions', referred to as provisional arrangement in the text. Lagoni has argued that even though the concept of provisional arrangements remained vague due to the lack of defined measures required by states, "the difference between the two approaches was by no means one of legal rhetoric only but one of substance."[32] In other words, the revision of subparagraph three in the RSNT and later in the Informal Composite Negotiating Text (ICNT)[33] were designed to promote provisional regimes and practical measures to be arranged between states concerned, enabling the provisional utilisation, including the resources, of the disputed maritime areas pending final delimitation.[34] The intention behind the earlier ISNT provisions was to restrain the spatial extent of activities of states, i.e. within their side of the median or equidistance, in disputed maritime areas.

Despite the revision, controversy over the articles and the divide between the two camps continued throughout the remaining sessions and during the sessions of NG7.[35] While the states favouring equitable principles doctrine supported keeping the RSNT provision intact – i.e., the provisional arrangements – states favouring the

[29] Nadan et al (n 21) para 83.7.
[30] Articles 74(1) and 83(1) of the LOSC.
[31] RSNT, *Official Records of the UNCLOS III,* Vol V, UN Doc. A/CONF.62/WP.8/Rev.1/Pt.II (1976) Articles 62(3) and 71(3) [emphasis added].
[32] Rainer Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78 *The American Journal of International Law* 345, 351.
[33] The document where all issues of the three RSNTs were brought together into one.
[34] Lagoni (n 32) 351.
[35] Nadan et al (n 21) para 83.11.

median line approach proposed, as a compromise, the following revision to paragraph three:

> Pending agreement or settlement in conformity with paragraphs 1 and 2, the parties in the dispute shall refrain from exercising jurisdiction beyond the median or equidistance line unless they agree on alternative interim measures of mutual restraint.[36]

Given the gap between the two approaches on the issue of 'interim solutions', the subsequent discussions in the NG7 endeavoured to bridge that gap. The Chairman believed that provisions should be encouraging provisional arrangements, which would not prejudice the final solution to the delimitation dispute.[37] During the meetings of the NG7, Morocco proposed an informal formula applicable to all maritime zones, including the territorial sea: "Pending the conclusion of an agreement or settlement, the States concerned shall abstain from any measure which could prejudice a final solution or in any way, aggravate their conflict, and shall endeavour to reach mutually acceptable, provisional arrangements, regarding the activities in the 'bona fide' disputed areas."[38] The delegations in the NG7 pointed out that the formula proposed by Morocco could be the basis of a compromise, but still lacked widespread support.[39] Papua New Guinea suggested an alternative provision, which explicitly included the possibility of establishing a moratorium on economic activities:

> Pending agreement or settlement, the States concerned shall, either (a) make provisional arrangements, taking into account the provisions of paragraph 1, or (b) establish a moratorium against economic activities within the area under dispute.[40]

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[36] All materials of the NG7 are informal and lack any documentary character. This suggestion was first made by a group of 20 States sponsored by the Bahamas, Barbados, Canada, Colombia, Cyprus Democratic Yemen, Denmark, the Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, the United Arab Emirates, The United Kingdom, and Yugoslavia (20 April 1978) Conf. Doc.NG7/2. Upheld until spring 1980 in Conf. Docs NG7/2/Rev.1 (25 March 1980); NG7/2/Rev.2 (28 March 1980), also cited in Kim (n 16) 35.
[37] Nadan et al (n 21) para 83.11.
[38] Informal suggestion by Morocco, Conf. Doc. NG7/3 (21 April 1978).
[39] Lagoni (n 32) 352.
[40] Informal suggestion by Papua New Guinea, Conf Doc. NG7/15 (9 May 1978).

Another informal suggestion by India, Iraq, and Morocco was made emphasising the provisional and 'transitory' character of the provisional arrangements. It omitted the reference to 'disputed area' found in Morocco's preceding suggestion:

> Pending agreement or settlement, the States concerned shall, in a spirit of cooperation, freely enter into provisional arrangements. Accordingly, they shall refrain from activities or measures which may aggravate the situation or jeopardize the interests of either State, during the transitory period. Such arrangements, whether of mutual restraint or mutual accommodation, shall be without prejudice to the final solution on delimitation.[41]

At the eighth session of the Conference in 1979, the Chairman of the NG7 argued against the introduction of a moratorium on economic exploitation, as proposed recently by Papua New Guinea, and instead suggested the addition of a prohibition of unilateral actions, to reach a consensus between the delegations. However, a prohibition of unilateral actions did not seem to achieve the desired consensus. The Chairman then convened a private group on the issue and found a compromise formula for paragraph 3, of articles 74 and 83, without the explicit prohibition of unilateral actions:

> Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort with a view to entering into provisional arrangements. Accordingly, during this transitory period, they shall refrain from activities or measures which may aggravate the situation and thus hamper in any way the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation. [42]

[41] Informal Proposal by India, Iraq, and Morocco Conf. Doc. NG7/32 (5 April 1979).
[42] Suggested formula of 22 August 1979 in Conf. Doc NG7/45 in (19 September 1979) UN Doc A/Conf.62/91.

This formula was inserted with some modification – removal of 'refraining from activities or measures which may aggravate the situation' – into the second revision of the ICNT in 1980, in its form as adopted in the Convention, as follows:

> Pending agreement as provided in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.[43]

This final compromise proposal was generally acceptable to the delegations. However, some delegations, such as Canada, expressed their reservations regarding articles 74 and 83 as a whole while underlining that the provisions were "the best basis of consensus achieved to date".[44] Although during the ninth session both camps re-submitted identical proposals to those made during the seventh session, a second revision of the ICNT incorporated the Chairman's final proposal.[45] The proposal remained intact throughout the remaining sessions of the Conference and became the basis of the present articles 74(3) and 83(3) of LOSC.[46]

The drafting history does not reveal any agreement over specific measures that would shed light on what type of 'provisional measures' were envisaged by the drafters of the Convention. Though one can understand what types of measures were not agreeable by the drafters considering the rejected proposals at the Conference. The concept of an 'economic moratorium' was proposed and rejected on several occasions. As such, in their present form, the articles do not require states to impose a moratorium on economic activities in disputed maritime areas, as confirmed by the case law subject to the obligation not to jeopardise or hamper (discussed below in Chapter IV).[47] The proposal for a median line as a provisional arrangement was also

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[43] Report of the Chairman of the negotiating group 7 (24 March 1980) UN Doc. A/CONF.62/L.47.
[44] Statement by the delegation of Canada dated 26 August 1980, Doc A/CONF.62/WS/14, *Official Records of the UNCLOS III*, Vol XIV, 1982, 153, para 12.
[45] Nadan et al (n 21) para 83.15.
[46] Draft Convention on Law of the Sea, UN Doc. A/CONF.62/L.78.
[47] *Guyana v. Suriname,* para 460.

discarded due to a lack of consensus between the drafters. Rather the compromise formula agreed upon intends for states to agree on their own 'interim solutions' without prejudice to the eventual delimitation agreement. In other words, the LOSC does not establish a list of arrangements that delineates which component of coastal state jurisdiction may be exercised pending delimitation. There is no prohibitive rule on the functional scope of provisional arrangements that states can agree upon for the disputed maritime areas. Rather, the LOSC defers the decision entirely to states. Therefore, even the rejected proposals, such as a median line, may be agreed upon as a provisional measure between states. There are no further details regarding provisional arrangements in the preparatory materials. This chapter now turns to some doctrinal issues concerning the interpretation of the obligation to enter into provisional arrangements.

3 Interpreting the obligation to seek provisional arrangements

Articles 74(3) and 83(3) of the LOSC present the obligation to enter into provisional arrangements as follows:

> Pending agreement [of a boundary] as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature…[s]uch arrangements shall be without prejudice to the final delimitation.[48]

This procedural obligation for disputed maritime areas, at first, may appear vague, as there is not much detail about what is meant by provisional arrangements. The language is rather open-ended because as explained above it was the result of a compromise to satisfy both camps.[49] On the one hand, this open and vague content brings flexibility. On the other hand, it may cause disagreements over interpretation. This chapter focuses on the ordinary meaning of the terms, taking into account their context, and in light of the object and purpose of the treaty as provided for in Article

[48] Articles 74(3) and 83(3) of the LOSC.
[49] Youri van Logchem, *The Rights and Obligations of States in Disputed Maritime Areas* (Cambridge University Press 2021) 137.

31 of the Vienna Convention on the Law of Treaties (VCLT).[50] It is clear that there is a positive obligation that requires states to take action – to make an effort to enter into provisional arrangements. The aim of the obligation is also clear: encouraging stability in the relations between disputing states through provisional arrangements.[51]

Based on the drafting history of this provision, the intention behind the concept of provisional arrangements is to promote the finding of practical solutions between disputing states concerning the use of the disputed maritime areas in the transitional period pending agreement on delimitation. The drafters envisioned arrangements to be 'provisional' or in other words, temporary, eventually giving way to the final agreement on the boundary, and as such, the arrangements are not creative of sovereign rights concerning the area or its resources.[52] The LOSC, however, does not mandate a particular type of provisional arrangement that states should enter into, rather states have the discretion to dictate the type of arrangement themselves.[53] As such, states have entered into a wide variety of arrangements in practice, such as joint development of hydrocarbon resources, a joint area for management, control, exploration and exploitation of the living and non-living resources, joint development or cooperation on fisheries, agreements on environmental cooperation etc.[54] Before considering modalities of arrangements preferred by some states, it is important to further discuss the components of the obligation to enter into provisional arrangements. An important question that arises is whether there is a legal obligation to adopt provisional arrangements or whether the obligation is less onerous and merely provides for an obligation to 'make every effort'. Even if the answer is the latter, taken together with the principle of cooperation, the normative framework promotes cooperation between discussed in Chapter II, states should seriously consider entering into provisional arrangements.[55]

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[50] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force, 27 January 1980) 1155 *UNTS* 331 (VCLT).
[51] Klein (n 14) 443.
[52] Articles 74(3) and 83(3) of the LOSC, ("[s]uch arrangements shall be without prejudice to the final delimitation"); *Aegean Sea Continental Shelf (Greece v. Turkey)*, Interim Protection, Order of 11 September 1976, ICJ Reports 1976, p. 3, para 29 (in the context of unilateral activities).
[53] Klein (n 14) 444.
[54] See section 4 below.
[55] Especially given the teeth that the decision in *Guyana v. Suriname* accords to the obligation to negotiate provisional arrangements.

3.1 The significance of 'arrangements'

It was explained above that, during the negotiations, there were different proposals for 'arrangements' pending delimitation during the drafting process. Eventually, instead of agreeing on proposals such as a moratorium or median line, the drafters agreed on the broader concept of provisional arrangements. First, the use of the broad term 'arrangements' denotes that states are not obliged to undertake a specific action or follow a pre-determined arrangement for disputed maritime areas – which would have been the case if, for example, the obligation agreed required no exercise of jurisdiction beyond the median line pending delimitation. Second, 'arrangements' is used to indicate informal agreements, a *modus vivendi.*[56] It is telling that the drafters of the Convention decided to use 'arrangements' and 'agreements' in distinction with each other in articles 74(3) and 83(3) of the LOSC. The latter word in this paragraph refers to the final delimitation 'agreement' under paragraph 1 and the former refers to solutions that states may agree upon for the governance of disputed maritime areas.[57] Furthermore, this juxtaposition of two terms also suggests that arrangements may be less formal or non-binding. An arrangement may, however, be a formal treaty between states – there is no strict obligation that arrangements have to be informal documents such as notes verbales, exchange of notes, or memoranda of understanding.[58] Therefore, the intention of the states expressed in the document is important in deciding the legal nature of a provisional arrangement – this is consistent with the discretion accorded to states under this paragraph to choose their own 'arrangements'. However, even if states choose to enter into binding provisional arrangements, they are unable to rely on the rights accorded to them by provisional arrangements in the negotiation of a maritime boundary.[59] Yet, it is worth noting that state can rely on the rights accorded to them by the provisional arrangements (so long as they remain in force) to discharge their duties flowing from multilateral governance frameworks.[60]

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[56] Kim (n 16) 42.
[57] Sep. and Dis. Opinion of Judge Oxman in *Mauritius v. Maldives,* para 44.
[58] Article 74(3) and 83(3) of the LOSC.
[59] Articles 74(3) and 83(3) of the LOSC; see also the modalities discussed in section 4.
[60] See Chapter V for institutionalised cooperation at the multilateral level.

Finally, articles 74(3) and 83(3) of the LOSC provide that provisional arrangements are to be of a 'practical nature'. The word practical suggests that arrangements must relate to actual doing, use of something or serve a functional purpose.[61] For example, in *Guyana v. Suriname,* the Tribunal considered that the concept of provisional arrangements is designed to promote interim solutions/regimes "for provisional utilization of disputed areas pending delimitation".[62] As such, one way of interpreting the term 'practical' in this context is that 'arrangements' should relate to functional/jurisdictional competencies of coastal states in their maritime areas (which are of course disputed) relevant to the governance of disputed maritime areas, namely, fisheries conservation and management, protection of the marine environment and utilisation of other non-living resources etc.[63] However, states would not necessarily be precluded from agreeing on a moratorium of use. After all, the final text was designed to let states choose their preferred arrangements given the controversies that were involved in the drafting of these provisions and that there were proposals for moratoria at UNCLOS III, which mean that if agreed between states, moratoria would not be contrary to the LOSC. Nonetheless, as the Tribunal in *Guyana v. Suriname* acknowledged, the obligation carries an implicit preference for avoiding the suspension of economic development in disputed maritime areas.[64] It should also be added that arrangements should take into account not only economic development but other objectives of the Convention and as such corresponding obligations, i.e., the conservation of living resources and the protection and preservation of the marine environment.

3.2 Obligation to negotiate in good faith to reach an arrangement

The text of articles 74(3) and 83(3) of the LOSC circumscribes the obligation to enter into provisional arrangements with the phrase 'shall make every effort'. One may interpret this language as not creating an obligation to enter into provisional arrangements. Indeed for some, this is a "meaningless [obligation] if there is no political will to comply with such an obligation…particularly if the States do not (or cannot) enforce compliance with this obligation through dispute settlement

[61] Van Logchem (n 49) 147-148.
[62] *Guyana v. Suriname*, para 460.
[63] Kim (n 16) 50.
[64] *Guyana v. Suriname,* para 460.

mechanisms".[65] However, it is not correct to say that the phrase entails "merely a nonbinding recommendation or encouragement".[66] Rather, according to Lagoni this obligation to seek agreement on provisional arrangements is "a mandatory rule whose breach would entail a violation of international law".[67] Nearly two decades after Lagoni's seminal work was published, the arbitral tribunal in *Guyana v. Suriname* ruled that both parties failed to comply with their obligation to make every effort to enter into provisional arrangements and thereby violated the LOSC.[68] Having established that both parties breached their obligations, the Tribunal referred to ITLOS's findings in the '*M/V Saiga*'[69] noting that in certain circumstances a judicial declaration that there has been a violation of a right or an obligation is sufficient reparation in the form of satisfaction.[70]

In terms of the language "every effort" and "in a spirit of understanding and cooperation", the Tribunal considered those phrases to impose "a duty to negotiate in good faith" and require States to undertake "a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement".[71] This interpretation emphasises that entering into provisional arrangements is an obligation of conduct, rather than an obligation of result.[72] The fact that the Tribunal went on to give examples of conduct that would have ensured compliance with the obligation to 'make every effort' to enter into provisional arrangements, in the circumstances of the case, confirm that this is an obligation of conduct, but one that requires consistent efforts to ensure compliance.[73]

Importantly, *Guyana v. Suriname* case clarifies the temporal scope of the obligation. It arises pending delimitation and only ends when states agree on a final boundary,

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[65] This thesis returns to the question of litigating disputes relating to articles 74(3) and 83(3) of the LOSC in Chapter VI; Tara Davenport 'The exploration and exploitation of hydrocarbon resources in areas of overlapping claims' in Beckman et al (n 2) 93-113, 104-105.
[66] Lagoni (n 32) 354.
[67] Ibid.
[68] *Guyana v. Suriname,* paras 474-477.
[69] *The M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, p. 7, para 171.
[70] *Guyana v. Suriname*, para 485.
[71] Ibid, para 461.
[72] This is also confirmed later in *Ghana v. Côte d'Ivoire,* para 627; Van Logchem (n 49) 148.
[73] *Guyana v. Suriname,* para 476-477.

meaning that even when parties fail at one round of negotiations to agree on a provisional arrangement disputing states are still bound by the obligation 'to make every effort' to enter into provisional arrangements.[74] For example, in the circumstances of Guyana and Suriname, despite an earlier failed attempt to agree on a provisional arrangement, in accordance with its obligation to enter into provisional arrangements, Guyana "should have, in a spirit of cooperation, informed Suriname of its [exploratory drilling] plans".[75] According to the Tribunal, to ensure consistency with the obligation to make every effort to enter into provisional arrangements, Guyana could have taken the following steps: "giving Suriname official and detailed notice of the planned activities…seeking cooperation of Suriname in undertaking the activities…offering to share the results of the exploration and giving Suriname an opportunity to observe the activities, and…offering to share all the financial benefits received from the exploratory activities".[76] Although the obligation to enter into provisional arrangements is framed as an obligation of conduct, and hence may not be considered particularly onerous, states should approach the obligation with the awareness that cooperation is a principle of governance in disputed maritime areas. What is more, making every effort to enter into provisional arrangements is one of the two ways in which the LOSC addresses the question of "how to live" with disputed maritime areas.[77]

4 Modalities of provisional arrangements

Entering into provisional arrangements pending delimitation is widespread. The research undertaken by the British Institute of International and Comparative Law (BIICL) identifies seven regions in which provisional arrangements exist or existed. In the South East Asia and South China Sea region the report identifies six provisional arrangements.[78] In the East Asia region, the report identifies eight provisional arrangements.[79] The report identifies nine provisional arrangements in sub-Saharan

[74] Ibid, para 476.
[75] *Guyana v. Suriname,* para 477.
[76] *Guyana v. Suriname,* para 477.
[77] Sep. and Dis. Op. of Judge *ad hoc* Oxman in *Mauritius v. Maldives,* para 13.
[78] BIICL Report, 102-103.
[79] Ibid, 104-105.

Africa and the Greater Indian Ocean region.[80] In the Mediterranean region, the report identifies two provisional arrangements.[81] Three arrangements are identified in the Caribbean and Gulf of Mexico region.[82] Finally, one arrangement was identified in North America, the Arctic and sub-Arctic region.[83] In total, the BIICL report discusses 29 provisional arrangements. Another source identifies 25 provisional arrangements globally.[84] However, the present author estimates that the number is most likely to be higher because some states may have entered into informal arrangements and have not made such arrangements public. In addition, the agreements between Timor-Leste and Australia are not dealt with within the BIICL report, although it is listed in the Annex, which is titled 'agreement and arrangements relating to maritime delimitation.

Broadly speaking, this section focuses on a selection of arrangements that states entered into. These arrangements can be divided into two categories.[85] The first of these is joint development or management zones. This type of arrangement is usually directed towards cooperative resource development, usually hydrocarbons, but also involves other resources such as fisheries. Second, in some instances, states may establish a provisional boundary. This section also discusses the arrangements between Australia and Timor-Leste, which cannot be easily put into one of the two categories because the parties agreed to a hybrid of these arrangements. The examples of arrangements discussed in this chapter are just samples and do not constitute an exhaustive list of arrangements for states. Moreover, the intention here is not to present a full account of all existing provisional arrangements. Such an undertaking is neither possible within the scope of this thesis nor desirable. Given that states are accorded necessary discretion concerning the establishment of provisional arrangements, the intention here is to analyse some practical examples of provisional arrangements. Consistent with the aim of this thesis, which is to consider normative and institutional framework for the management of disputed maritime areas, the rest

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[80] BIICL Report, 92-94.
[81] Ibid, 83-84.
[82] BIICL Report, 69.
[83] Ibid, 47.
[84] Ben Milligan, *Legal and policy options for the provisional joint management of maritime spaces subject to overlapping jurisdictional claims*, (Doctor of Philosophy thesis, Faculty of Law, University of Wollongong, 2012) available online at: https://ro.uow.edu.au/theses/3782.
[85] These two categories are the most common in state practice but of course, details of the arrangements do vary.

of the chapter aims to consider how provisional arrangements give effect to principles of governance discussed in Chapter II and also highlight important features of existing arrangements that states have entered into, such as establishment of joint institutions, which is another pillar of governance as introduced in Chapter I, to oversee the implementation of the arrangement.

Establishing a provisional arrangement in disputed maritime areas requires states to make several choices. Some of these choices are*, inter alia*: Do states wish to cooperatively manage the disputed maritime area by setting up a joint zone? If they do, do they focus on resource development, such as hydrocarbons or energy production from wind and waves? Once states decide the 'subject matter' of the arrangement, further choices are to be made concerning the structure and design of the arrangement as different subject matters will involve different considerations, such for example, whether they create institutions, for example, a joint commission to oversee activities or do they outline their responsibilities and rights in the agreement and manage their activities separately? If a joint zone is not preferable, do states wish to establish a provisional boundary that dictates the geographical scope of their jurisdiction for all activities, or one resource only, for example, fish? How to ensure compliance with obligations concerning the marine environment and other competencies provided for in the LOSC? These are only some of the policy options that states, and policymakers have to consider if they choose provisional arrangements for the management of their disputed maritime areas. In many cases, these are challenging choices as well as the added challenge of agreeing on them with another state. However, agreeing to provisional arrangements is also not the be all end all. The dynamic and changing interstate relations, factors external to relations between states such as social, economic, and environmental conditions will necessitate active adaptation of any agreed provisional arrangements. To simply put, arrangements entered into two or three decades earlier may need revising to reflect current circumstances. For example, in the Aegean Sea Turkey and Greece may once have agreed to a provisional arrangement on exploration and exploitation of the continental shelf for non-living resources, i.e., oil and gas. Today, such arrangements would need to be adapted in the face of climate change impacts and greater social outcry for banning fossil fuels in those countries may bring about a change in the

subject matter of the arrangements, i.e., a turn to renewable energy sources from the sea. Furthermore, in the face of thousands of refugees risking their lives in attempts to cross the Aegean Sea, disputed maritime area arrangements (hypothetically assuming that an arrangement exists) would need to respond to the change in maritime security developments. For example, states could strengthen their search and rescue cooperation in disputed maritime areas. The examples discussed below illustrate some of the choices made by states in this regard.

4.1 Joint Development/Management Arrangements

4.1.1 Norway and USSR

The provisional arrangement between Norway and USSR, albeit concluded before the entry into force of the LOSC, focused on fisheries pending delimitation in disputed maritime areas. The agreement concerned an 'Interim Practical Arrangement for Fishing in an adjoining area in the Barents Sea', concluded in 1978.[86] The agreement was established by an exchange of letters between states which inter alia confirmed the parties' intention to reach a final agreement on maritime boundary delimitation and that this provisional arrangement was 'without prejudice' to such an agreement.[87] Indeed, parties renewed the agreement, an option provided in the agreement, until 2011, when the agreement lapsed with the entry into force of the maritime boundary agreement between Norway and Russia signed in 2010.[88]

Churchill and Ulfstein explain why Russia, then the USSR, and Norway chose a provisional arrangement and why in particular on fisheries. While the negotiations have been ongoing for a maritime boundary delimitation[89], it was a priority for the two states to manage fisheries in the Southern Barents Sea, a heavily fished area by both

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[86] Agreement between Norway and the Soviet Union on a Temporary Practical Arrangement for Fishing in an Adjacent Area in the Barents Sea with Attached Protocol (11 January 1978) [1978] Overenskomster med fremmede Stater [Norwegian Treaty Series] 436 (English version is not available).

[87] It is to be noted that the agreement is not registered at the UN, the author was not able to secure an English version of the treaty and therefore relies on the information available in the literature, mostly on Robin Churchill and Geir Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea* (Routledge 1992).

[88] Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (adoption 15 September 2010, entry into force 7 July 2011) 2971 *UNTS* 1.

[89] For more the maritime boundary negotiations between Norway and the USSR see, Churchill and Ulfstein (n 87) 63-69.

states and third states.[90] According to Churchill and Ulfstein parties agreed that "[w]ithout such arrangement there would have been unregulated fishing, with a real danger of over-fishing and a resulting threat to the well-being of fish stocks, as well as the likelihood of confrontations and disputes if one state purported to exercise its jurisdiction over the vessels of other state or third states".[91] Therefore, the main purpose of the Interim Practical Arrangement was to settle the modalities of enforcement jurisdiction against third countries in the disputed area of the Barents Sea, sometimes referred to as the Grey Zone in the literature.[92]

The provisional arrangement applied to an area in the southern part of the Barents Sea where the EEZs of Norway and the USSR overlapped.[93] Concerning enforcement jurisdiction, the agreement provided that each party had jurisdiction only in relation to fishing vessels flying their flag and vessels of third states that they have licensed.[94] According to the arrangement, the joint Norwegian-Soviet Fisheries Commission (since 1991 Norwegian-Russian Fisheries Commission) determined the total allowable catch (TAC), quotas and other measures.[95] The Norwegian-Soviet Fisheries Commission was established by an earlier agreement, relating to cooperation on fisheries between the parties.[96] The Commission does not have power to adopt binding decisions, it only adopts proposals and recommendations.[97] The Commission was composed of one representative and one alternate representative from each party.[98] Norway and Russia agreed for the joint commission to meet at least once a year.[99] The functions accorded to the Commission are (a) to consider all questions arising in connection with the implementation of the Agreement; (b) draw up plans for the development of the cooperation covered by the Agreement; (c) organise consultations; (d) as necessary, draft proposals and recommendations for the parties

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[90] Ibid, 65.
[91] Ibid.
[92] Maria Hammer and Alf Håkon Hoel 'The Development of Scientific Cooperation under the Norway - Russia Fisheries Regime in the Barents Sea' (2012) 3 *Arctic Review on Law and Politics*, 244, 251.
[93] The area designated by the agreement covered a geographical area larger than the disputed maritime area, including undisputed areas of Norwegian and USSR EEZs.
[94] Churchill and Ulfstein (n 87) 63 and 113.
[95] For more on the details of the arrangement, see Churchill and Ulfstein (n 87) 113-114.
[96] Agreement on co-operation in the fishing industry (adopted 11 April 1975, entered into force 11 April 1975) 983 *UNTS* 3 (hereinafter 'Norway-Russia Agreement').
[97] Article 4(1) of Norway-Russia Agreement; Churchill and Ulfstein (n 87) 94 and 98.
[98] Norway-Russia Agreement, Article 3(2).
[99] Ibid, Article 3(3).

and (c) consider such other questions as may be referred to it by the parties.[100] The author is not aware of any dispute settlement provisions designed to ensure resolution of disagreement over any aspect of fishing or their agreement, which was a significant gap in this agreement.[101]

4.1.2 Republic of Korea and Japan

There are two separate provisional arrangements in place between Korea and Japan.[102] One on fisheries and the other on hydrocarbon development in relation to their disputed maritime area. Chronologically, the parties first entered into a joint development agreement, before the entry into force of the LOSC, to explore and exploit "petroleum resources in the southern part of the continental shelf adjacent to the two countries".[103] The agreement, consisting of 31 articles, establishes the coordinates of the 'joint development zone'.[104] The agreement establishes, in detail, particulars of exploration and exploitation operations by the concessionaries authorised by the parties. The provisional arrangement agreement also establishes the Japan-Korea Joint Commission to facilitate "consultations on matters concerning the implementation of this agreement" and give various functions to the Commissions, *inter alia,* reviewing the operation of the agreement and recommending measures for its improvement.[105] This is a 50-year agreement. After this period, unless terminated with 3 years' notice, the agreement remains in force.[106] On the one hand, a 50-year period for a provisional arrangement seems very long. However, it offers stability for economic development of the resources and importantly, if parties agree that natural resources in the JDZ are no longer economically exploitable parties can revise or

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[100] Norway-Russia Agreement, Article 4(1) and (2).
[101] Writing in 1992, Churchill and Ulfstein (n 87) claim that consultations between the parties in the joint commission have not led to any serious conflicts, p. 102 and 114.
[102] It is important to note Japan and Korea have a partial delimitation agreement, which establishes the northern part of their continental shelf boundary (in the channel dividing the land territory of both states towards the Sea of Japan). Agreement between Japan and Korea concerning establishment of boundary in the northern part of the continental shelf adjacent to the two countries (adopted 30 January 1974, entry into force 22 June 1978) 1225 *UNTS* 103 (hereinafter 'Japan-Korea partial continental shelf delimitation agreement').
[103] Agreement between Japan and Korea concerning joint development of the southern part of the continental shelf adjacent to the two countries (adopted 30 January 1974, entry into force 22 June 1978) 1225 *UNTS* 113, (hereinafter 'Japan-Korea JDZ Agreement').
[104] Japan-Korea JDZ Agreement, Article 2.
[105] Ibid, Article 24 and 25.
[106] Japan-Korea JDZ Agreement, Article 31(2) and (3).

terminate the agreement before the 50 years or anytime thereafter.[107] What is more, the final boundary agreement is complicated because China also has claims in this part of the East China Sea – which may partially explain the lengthy period agreed upon for the provisional arrangement between Korea and Japan.

In terms of the particular choices made by the states in the agreement for exploration and exploration, each party can authorise one or more concessionaries for each sub-zone and the concessionaries enter into an 'operating agreement' which, inter alia, includes the designation of an 'operator' among the concessionaries for a particular sub-zone.[108] The 'operator' formula makes it unnecessary to decide the respective jurisdictions of the two countries in each sub-zone, as, for example, Japanese law applies automatically in a sub-zone, as per the agreement, where the Japanese concessionaire is designated as the operator.[109] Parties and their concessionaries share expenses incurred in the exploration and exploitation phases equally, and so are the natural resources extracted in a subzone, between the concessionaires of the two countries.[110]

The JDZ Agreement also provides for the peaceful settlement of disputes regarding the interpretation and implementation of the Agreement, at first instance, through diplomatic channels.[111] If no settlement is reached, the dispute "shall" be referred for decision to an arbitration board composed of three arbitrators.[112] The agreement also empowers the arbitration board to be able to issue a provisional measures order, pending the award and provides that the parties "shall" abide by the arbitral award.[113] As a final note, the JDZ Agreement contains a 'no prejudice clause' assuring parties that "[n]othing in this Agreement shall be regarded as determining the questions of sovereign rights over all or any portion of the Joint Development Zone or as prejudicing the positions of the respective parties with respect to the delimitation of the continental

[107] Ibid, article 31(4).
[108] Ibid, Articles 4 and 5.
[109] Ibid, Article 19.
[110] Ibid, Article 9.
[111] Ibid Article 26(1).
[112] Ibid, Article 26(2).
[113] Ibid Article 26 (4) and (5).

shelf".[114] Currently, parties are reportedly in a deadlock over the JDZ.[115] While Korea wishes to continue on exploration, Japan suspended exploration activities based on economic infeasibility.[116] From a governance perspective, in the first instance the institutional mechanism, the Joint Commission, found in the JDZ Agreement may facilitate a potential resolution of this disagreement between the parties. If the Joint Commission is unable to do so, the principles of governance (discussed in Chapter II) guide states. States should pursue, in good faith, a peaceful resolution of the present disagreement, this is also required by the JDZ Agreement. There are other peaceful dispute settlement options available to states. Apart from binding dispute settlement, such sensitive and complex disputes could be referred to a conciliation commission. This thesis returns to the issue of dispute settlement in the context of disputed maritime areas in the forthcoming chapters.[117]

The second agreement between parties, concluded in 1998, concerns fisheries.[118] This agreement is slightly more complicated than the JDZ Agreement. In fact, Korea had reservations about the conclusion of this agreement before the delimitation of the EEZ boundaries, but the Japanese side convinced Korea that the delimitation of EEZ boundary was not a prerequisite for the fisheries agreement.[119] The preamble of the agreement refers to the LOSC, but there is no direct reference to the obligation to enter into provisional arrangements pending delimitation pursuant to Articles 74(3) and 83(3) of the LOSC. Notwithstanding, the agreement in practice establishes two provisional joint fisheries zones[120] and also establishes a partial 'provisional EEZ boundary' using the coordinates of continental shelf boundary drawn by the 1974

[114] Japan-Korea JDZ Agreement, Article 28.
[115] For more on this issue see, Jee-hyun Choi, 'Korea–Japan JDZ to End in Deadlock? The Potential for Unilateral Korean Exploration and Exploitation' (2020) 51 *Ocean Development & International Law*, 162.
[116] This thesis returns to the issue of settling this 'deadlock' between the two states in later chapters.
[117] See Chapters VI and VII.
[118] Agreement between Japan and the Republic of Korea concerning fisheries (adopted 28 November 1998, entry into force 22 January 1999) 2731 *UNTS* 305 (hereinafter 'Japan-Korea Fisheries Agreement') (This thesis relies on the English translation of the Agreement at 345).
[119] Kim (n 16) 252.
[120] Japan-Korea Fisheries Agreement, Articles 8 and 9. One of these provisional fisheries zones is in the Sea of Japan/East Sea connected to the northern terminus of the Japan-Korea partial continental shelf delimitation agreement, and the other connecting to the southern terminus in the East China Sea.

partial continental shelf delimitation agreement.[121] In other words the partial continental shelf boundary is used as a fisheries boundary, albeit a provisional one. The agreement further provides that the parties "shall continue to negotiate in good faith for a prompt delimitation of their exclusive economic zones".[122] Therefore, this fisheries agreement constitutes a provisional arrangement of a practical nature within the meaning of article 74(3) of the LOSC.[123]

Let us now briefly examine the agreement and the regime it creates for the management of the disputed maritime areas. The agreement obliges Korea and Japan to cooperate regarding "rational conservation and management as well as optimal exploitation of marine living resources" in all areas covered by this Agreement, namely, the provisional joint fishing zones and the EEZs.[124] The agreement also addresses navigation – obliging both parties to comply with international laws and regulations in the area of navigation and safety – by providing that states and their competent authorities communicate and cooperate "as closely as possible" to maintain safety and order of operations between fishing vessels of Korea and Japan as well as smooth and prompt settlement of accidents.[125] The agreement also sets up a Joint Fishing Committee to deliberate and formulate recommendations to both governments on various fisheries-related matters, in the implementation of the Agreement.[126] It seems that the Committee may make 'decisions' on the provisional joint fishing zone in the East China Sea[127], implying a binding character, in comparison with the ability to make 'recommendations' concerning the zone in the East Sea/Sea of Japan.[128] The range of issues on which the Committee may consider and render recommendations are broadly termed in the Agreement.[129] As an example, the Committee may consider and render recommendations, *inter alia*, on matters relating to EEZ fishing access, such

[121] Ibid, Article 7(1). The coordinates used in this article matches exactly the coordinates of the agreement concerning the establishment of boundary in the northern part of the continental shelf, see Japan-Korea partial continental shelf delimitation agreement, Article 1.
[122] Japan-Korea Fisheries Agreement, Annex 1, Article 1.
[123] Kim (n 16) 253.
[124] Japan-Korea Fisheries Agreement, Article 10.
[125] Ibid, Article 11(1) and (2).
[126] Ibid, Article 12.
[127] Japan-Korea Fisheries Agreement, Article 12(1) and (4).
[128] Ibid, Article 12(4) and 12(5).
[129]Japan-Korea Fisheries Agreement, Article 12(1)-(6).

as the species of fish allowed to be caught, catch quotas, areas of fishing and specific conditions on fishing operations.[130]

Apart from these aspects discussed above that apply to all geographical areas covered by the Agreement; there are separate rules for the EEZ of each party, as provisionally delimited by this Agreement, and for the provisional joint fisheries zones.[131] Articles 2 to 6 of the Agreement provide detailed rules and conditions regarding access for one party's fishing vessels in the EEZ of the other party – these rules do not apply to provisional joint fishing zones. The basic premise is that each party, per its laws and regulations applicable in the EEZ, shall permit fishing vessels of the other party to fish in its EEZ, based on reciprocity, under the provisions of the Agreement.[132] In accordance with the LOSC, each party determines annually conditions of fishing in their EEZ and communicates, in writing, to the other party its catch quotas and other conditions.[133] Fishing vessels of one party when fishing in the EEZ of the other party, must comply with the Agreement and relevant rules and regulations applicable therein.[134] Flag states are responsible to take necessary measures to ensure vessels fishing in the other states' EEZ comply with the applicable rules and regulations, but cannot exercise jurisdiction in the other state's EEZ.[135] Furthermore, each party exercises enforcement jurisdiction "in accordance with international law", taking necessary measures to ensure vessels fishing in its EEZ, including the vessels of the other party, comply with the relevant rules and regulations.[136] Finally, the agreement purports that parties must notify without delay the other party of any measures for the conservation of maritime living resources and other conditions in its laws and regulations.[137]

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[130] Ibid.
[131] Japan-Korea Fisheries Agreement, Articles 7, 8 and 9.
[132] Ibid, Article 2.
[133] Japan-Korea Fisheries Agreement, Article 3.
[134] Ibid, Article 5(1).
[135] Japan-Korea Fisheries Agreement, Article 5(2).
[136] Ibid, Article 6(1). This includes seizure of the vessel o detention but must give immediate notice to the other party via diplomatic channels regarding measures taken and penalties incurred. The crew and the vessel to be realised without delay upon posting of a bond or other payment, Articles 6(2) and (3) of the Japan-Korea Fisheries Agreement.
[137] Ibid, Article 6(4).

As mentioned above, different rules apply in relation to the provisional joint fishing zones. There are two separate provisions dealing with jurisdiction in each provisional fishing zone. The provisions are almost identical, except they differ on the Joint Fisheries Committee, as mentioned above. The Committee can only make 'recommendations' in relation to the zone in the Sea of Japan, while being able to make 'decisions' in relation to the zone in the East China Sea, for the conservation and management of marine living resources.[138] The reason for this seems to be Korea's reluctance to accept any implication that the fishing zone is 'jointly' managed by the joint committee, presupposing that this would implicate the territorial dispute over Dok-do/Takeshima, which is situated in this provisional joint fisheries zone. However, these worries were unfounded for two reasons. First, when making a decision or recommendation the Agreement provides that "all recommendations or decisions of the Commission" are made with "the consent of the representatives of the Governments of the two Contracting States".[139] Second, both the LOSC and the Agreement explicitly acknowledge that the provisional arrangements are without prejudice to party's positions and the final agreement.[140]

The basic common rule for these joint fishing zones is the application of flag-state jurisdiction.[141] In the words of the Agreement: "[n]either Contracting State shall apply its own relevant laws and regulations regarding fisheries to the nationals and fishing vessels of the other Contracting State in these maritime zones".[142] However, the agreement provides for an indirect form of cooperation between Japan and Korea concerning enforcement jurisdiction by obliging each party to 'exchange information' on rules and regulations applicable to[143], and any measures taken towards, their nationals and vessels in the joint zone.[144] If one of the parties becomes aware of violations of conservation and management measures applicable in the joint zone by the other party's nationals or fishing vessels, that state may inform the other party regarding the violation. The flag state, after verifying the information and facts may

[138] Japan-Korea Fisheries Agreement, Annex I, Article 2 and 3 respectively; Kim (n 16) 259-260.
[139] Japan-Korea Fisheries Agreement, Article 12(6).
[140] Ibid, Article 15; Articles 74(3) and 83(3) of the LOSC.
[141] Japan-Korea Fisheries Agreement, Annex 1, Article 2(1) and 3(1).
[142] Ibid.
[143] Such as fishing quotas and type of fishing, and spices of fish, see Japan-Korea Fisheries Agreement, Annex 1, Article 2(4) and 3(4).
[144] Ibid, Annex 1, Article 2(3) and 3(3).

respond appropriately against its nationals or fishing vessels, and "shall inform the notifying party of these results".[145] One shortcoming of the agreement is that it does not deal with third-party fishing in these joint fishing zones – parties agreed to flag state jurisdiction over vessels.[146] This may hinder the objectives of the arrangement entered into. For example, Chinese vessels are granted licenses to fish from both Korea and Japan in their respective EEZs. However, Chinese vessels reportedly engage in unlicensed fishing activities in the joint fishing zones, which raises concerns about the proper conservation and management of the living resources in the disputed maritime areas, since their arrangement does not address third-party fishing.[147] This circumstance raises following questions: which states' rules and regulations apply to the third-party fishing and which state can exercise enforcement jurisdiction if one of the states' suspect IUU fishing by a third-party vessel? As such, not addressing third-party fishing in their arrangements, Korea and Japan left a gap in the management of disputed maritime areas. Nonetheless, the issue of third-party fishing is a matter within the competence of the Joint Fisheries Committee. The Committee may consult and issue recommendations or decisions to the parties on this issue. Furthermore, now faced with a changed circumstance surrounding the disputed maritime area Japan and Korea may feel compelled to deepen their existing provisional arrangement to respond and address third-party fishing.

Finally, the parties have agreed to a process of dispute settlement for disputes concerning the interpretation and application of this Agreement. According to article 13, Korea and Japan shall settle their disputes concerning the interpretation and application of this Agreement through consultations.[148] If consultations do not settle the dispute, with the consent of both parties, the dispute shall be submitted to arbitration for a binding outcome.[149]

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[145] Japan-Korea Fisheries Agreement, Annex 1, Article 2(5) 3(5).
[146] Hyun Jung Kim, 'Third Party Fishing in an Undelimited Area under the Republic of Korea–Japan Fisheries Agreement' (2021) 125 *Marine Policy* 104402.
[147] ibid 2–3.
[148] Japan-Korea Fisheries Agreement, Article 13(1).
[149] Ibid, Article 13(2).

4.1.3 The United Kingdom and Denmark (Faroe Islands)

The UK and Denmark agreed to the limits of their fisheries zone and continental shelf in the maritime area between Scotland and the Faroe Islands in 1999.[150] In addition to the boundary, the parties established a "Special Area" where both parties are entitled to exercise rights and jurisdiction in relation to continental shelf and fisheries, as specified in the agreement.[151] Whether the agreement concerning the 'Special Area' constitute a provisional arrangement within the meaning of Article 74(3) and 83(3) of the LOSC or whether the Area can be classified as a disputed maritime area is doubtful. The agreement delimits the maritime boundary between the parties apart from the Special Area, where parties preferred to share rights and jurisdiction instead of using a maritime boundary line to establish the limits of their jurisdiction. This agreement is not time constrained and therefore can neither be considered provisional/temporary nor 'pending delimitation' since the rest of the boundary is agreed upon. Nonetheless, the parties have overlapping rights and jurisdiction at least technically, in the Special Area. As such, it is still useful to consider the modalities of this agreement for this chapter.

Parties agreed that each of them will continue to apply rules and regulations for the management of fisheries in the Special Area, including licencing and conduct of fisheries.[152] Parties also agreed not to inspect and control fishing vessels in the Special Area operating under a licence issued by the other and not to undertake any action that would disregard or infringe upon the exercise of fisheries jurisdiction by the other Party or conduct of fisheries under a licence issued by the other party.[153] Article 6 of the Agreement deals with the exercise of rights and jurisdiction concerning the continental shelf, however, most of the provisions deal with preventing the exercise of such rights and jurisdiction from interfering with fishing activities undertaken in the Area. The exception is the first provision under article 6 of the Agreement, which

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[150] Agreement between the Government of the Kingdom of Denmark together with the Home Government of the Faroe Islands, on the one hand, and the Government of the United Kingdom of Great Britain and Northern Ireland, on the other, relating to Maritime Delimitation in the Area between the Faroe Islands and the United Kingdom (adopted 18 May 1999, entry into force 21 July 1999) (hereinafter '1999 Agreement') available online at: https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/GBR.htm

[151] Ibid, Article 4(1).

[152] Article 5(a) of 1999 Agreement.

[153] Ibid, article 5(b) and (c).

provides that parties "take all possible steps" to prevent and eliminate pollution to the marine environment pursuant to their obligations under relevant the regional governance arrangements[154] – the OSPAR Convention.[155] Other than that each party are obliged when exercising rights and jurisdiction concerning the continental shelf, *inter alia,* to take due account of the fishing interests of the other party; avoid unnecessary interference with fishing carried out under a licence issued by the other party; and inform the other party, promptly, of any activity which may harm the marine environment or fisheries.[156] Parties are also under an obligation not to unilaterally exercise any other aspect of coastal state rights and jurisdiction that do not follow directly from continental shelf or fisheries jurisdiction, but to ensure that they cooperate on such matters, "notably on measures to protect the marine environment".[157] The agreement also provides that parties may call, through diplomatic channels, for consultations to reach an agreement on any issue concerning articles 5, 6 and 7. Parties are under an obligation to hold consultations within sixty days of the receipt of the call.[158]

In 2012, parties adopted a Protocol to 1999 Agreement[159] with particular emphasis on their "joint interest in protecting the marine environment throughout the Special Area".[160] The Protocol provides for the exercise of rights and jurisdiction, previously limited by Article 7 of the Agreement, concerning the protection of the marine environment and marine scientific research (MSR).[161] Each party may extend its rules and regulations on marine environmental protection to the Special Area and enforce such legislation vis-à-vis vessels flying the flag of third states while the vessels flying the flag of the parties to the Protocol are exclusively subject to flag state jurisdiction.[162] The Protocol also reaffirms that under Articles 5 and 6 of the 1999 Agreement each

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[154] This thesis discusses multilateral (regional) governance in the context of disputed maritime areas in Chapter V.
[155] Article 6(a) of the 1999 Agreement; OSPAR Convention.
[156] Article 6 of the 1999 Agreement.
[157] Ibid, Article 7.
[158] Article 8 of the 1999 Agreement.
[159] Protocol to the 1999 Agreement between the UK and Denmark (adopted 25 April 2012, entered into force 31 March 2014) available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/350908/42904_Cm_8934_accessible.pdf
[160] Ibid, Preamble.
[161] Article 1 of the Protocol to the 1999 Agreement.
[162] Ibid, Article 1(1).

party has the right to authorise MSR relating to fisheries resources or resources of the continental shelf. The protocol establishes that parties now also have the right to authorise other kinds of MSR in the Special Area. There is no further condition if the vessel authorised to conduct the research flies the flag of the authorising party, but if the vessel conducting the research is a third state flagged, the authorising party must give advance notification to the other party to the Protocol.[163] Finally, the Protocol restrains any activity relating to the utilisation of the water surface or column for economic purposes (other fisheries and continental shelf rights) such as renewable energy production from the water, currents and wind, unless done with prior consent from the other Party.[164]

While neither the 1999 Agreement nor the Protocol establishes institutions to oversee the implementation of the agreement or assist parties with implementation, parties cooperate through regional governance institutions, which complement the implementation of this agreement. As mentioned above, parties participate at the multilateral level, *inter alia,* in the OSPAR Commission concerning the protection of the marine environment and North-East Atlantic Fisheries Commission (NEAFC)[165] on fisheries management. This is an illustration of 'nesting' of bilateral arrangements within multilateral governance arrangements/institutions. The arrangements do not operate independently, rather, they form a part of the process of management, which includes broader institutional frameworks.[166]

After Brexit, the UK entered into a bilateral 'Framework Agreement on Fisheries'[167] with the Government of the Faroes, which provides, *inter alia,* that parties shall hold annual consultations on access to the other's area of fisheries jurisdiction and transfer of quotas.[168] Within the framework of the consultations held in 2022, Faroes and the UK recorded their agreement to continue consultations in 2022 "to reach a legally

[163] Ibid, Article 1(2).
[164] Article 3 of the Protocol to 1999 Agreement.
[165] Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries (adopted 18 November 1980 entry into force 17 March 1982) 1285 *UNTS* 129 (hereinafter 'NEAFC')
[166] See Chapters V and VI.
[167] Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Faroes (adopted 29 October 2020, no entry into force information) (hereinafter 'Framework Agreement on Fisheries').
[168] Ibid, Article 3.

robust, bilaterally agreed system for the licensing of third country vessels fishing in the Special Area" as soon as possible.[169] Pending that agreement, parties agreed to exchange information on licences issued to third-state vessels which grant access to fish in the Special Area. Parties are required to exchange information, within 24 hours of a licence being issued, on Vessel data (IMO number/registration) and the licence conditions that apply to such vessels, including conditions specific to the Special Area.[170]

4.2 Provisional Boundary Arrangements

4.2.1 Tunisia and Algeria

In 2002, Algeria and Tunisia entered into an agreement establishing a provisional maritime boundary.[171] The preamble of the Agreement directly refers to the LOSC, and articles 74(3) and 83(3) of the LOSC concerning provisional arrangements and reiterate their determination to conclude a definitive delimitation agreement. Articles 1 and 2 of the Agreement outline the boundary agreed upon between the parties. The agreement confirms that Algeria and Tunisia shall exercise sovereignty, sovereign rights, and jurisdiction west and east, respectively, of the provisional boundary line.[172] While one may expect that this is enough as a provisional arrangement, parties went a little bit further than just establishing a provisional boundary to delimit their competencies. There are two further provisions calling for cooperation between parties in certain circumstances. First, parties obliged each other to reach another provisional arrangement, "[i]n the event of discovery of deposits of mineral resources that cross the provisional line", for equitable exploitation of such resources.[173] Second, parties agree to cooperate and coordinate their activities concerning, *inter alia,* the conservation of natural resources, particularly living resources; search and rescue operations at sea; prevention and punishment of customs, sanitary and fiscal offences and illegal immigration; and in the application of contractual regulations, in particular

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[169] Agreed Record of Fisheries Consultations between Faroes and the UK for 2022, para 9.2, available online at: https://www.gov.uk/government/publications/fisheries-bilateral-agreement-with-the-faroe-islands-for-2022

[170] Ibid, para 9.3.

[171] Agreement on Provisional Arrangements for the Delimitation of the Maritime Boundaries between the Republic of Tunisia and the People's Democratic Republic of Algeria (adopted 11 February 2002, entry into force 23 November 2003) 2238 *UNTS* 197. (This thesis uses the English translation at 208).

[172] Article 3 of Algeria-Tunisia Provisional Boundary Agreement.

[173] Ibid, Article 5.

shipping and air traffic security as well as the marine environment.[174] However, the provisional arrangement does not set up institutions to facilitate such cooperation between the states.[175] Though notably, both Algeria and Tunisia were cooperating at the multilateral level through institutions established by the Barcelona Convention and the General Fisheries Commission for the Mediterranean.[176] Similar to the case of UK and Denmark, Algeria and Tunisia's arrangement operated within these two multilateral institutions. As other provisional arrangement considered above, this agreement also includes a 'no-prejudice' to final delimitation clause as well as providing for the settlement of disputes concerning the agreement by consultation or any other means agreed by them.[177] Finally, the rest of the agreement deals with the termination of the agreement. In particular, the parties agreed to agree "on the definite delimitation of the maritime boundary" at the end of the six years upon the ratification of the agreement, which was the initial time limit set by the parties for the agreement.[178] However, if the parties fail, they may agree to renew or revise the provisional boundary agreement.[179] These provisions proved to be an encouragement for parties to enter into a final agreement, which they did in 2011.[180]

4.2.2 Republic of Ireland and the UK

Ireland and the UK entered into a provisional maritime boundary delimitation for a part of their overlapping continental shelf, which had not been delimited by an earlier agreement.[181] Both in the title of the agreement and within the agreement, there are references to article 83(3) of the LOSC. The boundary, according to the agreement, is "in accordance with Article 83(3) of the [LOSC]…as a provisional arrangement of a practical nature" and that the agreement "shall be without prejudice to any future

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[174] Article 6 of Algeria-Tunisia Provisional Boundary Agreement.
[175] This author could neither find any information on existence of a bilateral body consultative or otherwise to oversee the implementation of the agreement.
[176] For more on these two multilateral institutional frameworks, see Chapter V.
[177] Article 7 of Algeria-Tunisia Provisional Boundary Agreement.
[178] Articles 9 and 10 of the Algeria-Tunisia Provisional Boundary Agreement.
[179] Ibid, Article 10.
[180] Published in Journal Officiel de la Republique Algerienne Democratique et Populaire No. 46, 22 Septembre 2013, at. p.3 (Agreement is in French).

[181] Exchange of Notes dated 18 October 2001 and 31 October 2001 between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland constituting an agreement pursuant to Article 83 paragraph 3 of the United Nations Convention on the Law of the Sea 1982 on the provisional delimitation of an area of the continental shelf (adopted 18 October 2001, entry into force 31 October 2001) 2309 *UNTS* 21.

agreement…on the delimitation of the Continental Shelf in the area".[182] This simply worded agreement allowed for the laying of a new pipeline across the seabed between the two countries through the undelimited area with the purpose of "ensur[ing] that the relevant legislation of one or other of the two States will be applicable to the entire length of the proposed pipeline".[183] The agreement was terminated with the conclusion of a maritime boundary agreement in 2013.[184]

4.3 Hybrid arrangements: Australia and Timor-Leste

Australia and East Timor made use of multiple types of provisional arrangements for their disputed maritime areas, including a joint petroleum development zone (JPDZ) pursuant to the 2002 Timor Sea Treaty[185], 2003 Agreement in relation to Unitisation Greater Sunrise Fields[186] and a revenue sharing arrangement in relation to Greater Sunrise Fields and a provisional boundary delimiting parties' sovereign rights and jurisdiction over the water column under the 2006 CMATS.[187] These three treaties made up the provisional arrangements of Australia and Timor-Leste.

The Timor Sea Treaty explicitly takes into account the obligations of the parties under article 83(3) of the LOSC[188], establishing a JPDZ to jointly control, manage and facilitate exploration, development and exploitation of the petroleum resources in the disputed maritime area between Timor-Leste and Australia.[189] Some of the important features of this agreement include the production sharing and institutional/administrative arrangements, which are as follows: 90% of the production belonged to Timor-Leste and 10% belonged to Australia and the Treaty established a three-tiered administrative structure composed of a Joint Commission, a Designated

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[182] Ibid.
[183] Ibid.
[184] Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland establishing a single maritime boundary between the exclusive economic zones of the two countries and parts of their continental shelves (adopted 28 March 2013, entry into force 31 March 2014) 2984 *UNTS* 251.
[185] Timor Sea Treaty (adopted 20 May 2002, entry into force 2 April 2003) 2258 *UNTS* 3 (hereinafter 'TST').
[186] Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise Troubadour Fields (adopted 6 March 2003, entry into force 23 February 2007) 2483 *UNTS* 317 (hereinafter 'Unitisation Agreement'.)
[187] Treaty between Australia and Timor-Leste on Certain Maritime Arrangements in the Timor Sea (adopted 12 January 2006, entry into force 23 February 2007) 2483 *UNTS* 359 (hereinafter 'CMATS').
[188] Article 2(a) and preamble of TST.
[189] Ibid, Article 3 (a) and (b).

Authority and a Ministerial Council.[190] The Designated Authority (DA) is designated by and responsible to the Joint Commission, and the parties undertake the position alternatingly.[191] The main function of the DA is to carry out day-to-day regulation and management of petroleum activities.[192] The Joint Commission, made up of commissioners appointed by both parties, establishes policies and regulations for activities in the JPDA and oversees the work of the Designated Authority.[193] The Ministerial Council consists of an equal number of Ministers from Australia and Timor-Leste, the main task of the Council is to consider any matter/dispute relating to the operation of the Treaty that the parties may refer to it.[194] If a matter cannot be resolved by the Ministerial Council, the treaty provides for an arbitration procedure that one of the parties may initiate.[195] While the Timor Sea Treaty is mainly focused on the joint development of petroleum resources, the Treaty provided for cooperation concerning other coastal state competencies, *inter alia,* marine environmental protection[196], hydrographic and seismic surveys[197], and search and rescue.[198]

The implementation of the Timor Sea Treaty proved difficult when exploration proved that Greater Sunrise deposits straddle the eastern boundary of the JPDZ. The parties then concluded the Unitisation Agreement, which apportioned 20.1% of the production to JPDZ and 79.9% to Australia.[199] However, Timor-Leste did not ratify the agreement right away as it disagreed with the apportionment ratio. The utilization agreement only came into force together with CMATS in 2007. Article 5 of the CMATS addressed Timor-Leste's concerns over its share of the Greater Sunrise Fields, which provides that the parties equally share the revenue derived from upstream production.[200]

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[190] Article 6 of TST.
[191] Ibid, Article 6(b).
[192] Article 6(b)(iv) of TST.
[193] Ibid, Article 6 (c)(i).
[194] Article 6(d)(i) of TST.
[195] Articles 6(d)(ii) and 23(b) of TST.
[196] Ibid, Article 10. The treaty calls for 'special efforts' to protect marine animals, including marine mammals, fish, seabirds, and corals. The Designated Authority issues regulations for protection of the marine environment in the JPDZ and is tasked to develop a contingency plan for combatting pollution.
[197] Article 16 of the TST.
[198] Ibid, Article 20.
[199] Article 7 of Unitisation Agreement.
[200] Article 5 of CMATS.

Another aspect of the CMATS treaty is the provisional delimitation of the parties' "water column jurisdiction" according to a line defined in Annex II of the treaty.[201] Article 8 of the CMATS is entitled 'water column jurisdiction' provides that in the south of the line Australia, and in the north of the line Timor-Leste exercise sovereign rights and jurisdiction over the resources of the water column.[202] The boundary line coincides with the southern limit of the JPDA established in the Timor Sea Treaty, meaning that Timor-Leste exercises water column jurisdiction within the JPDA. However, Timor-Leste must ensure its exercise of jurisdiction does not unduly inhibit petroleum activities in the JPDA.[203] While water column jurisdiction presumably refers to multiple activities such as the production of energy from waves or wind, Article 8 explicitly deals with the management of fisheries. Alluding to the obligations of coastal states under the LOSC[204], the CMATS calls for cooperation between the parties where stocks straddle the provisional boundary line and concerning highly migratory fish stocks either directly or through appropriate sub-regional or regional fisheries management organisations to agree upon measures for the conservation, management and development of such stocks.[205] In relation to institutional arrangements, the CMATS established the Timor-Leste/Australia Maritime Commission[206] to "constitute a focal point for bilateral consultations with regard to maritime matters of interests to the parties".[207] The Commission's tasks included, inter alia, reviewing the status of parties' maritime boundary arrangements, and consulting on matters of marine environmental protection.[208] Unlike the other two agreements of the parties, disputes concerning the CMATS Treaty may only be settled by negotiations or consultations.[209] While the CMATS established a moratorium on dispute settlement regarding maritime boundaries or delimitation, Timor-Leste was able to successfully initiate, albeit facing

[201] Ibid, Article 8.
[202] Article 8 of the CMATS.
[203] Ibid, Article 8(1)(c).
[204] Timor-Leste was not a party to the LOSC when this agreement entered into force between the parties. Timor-Leste acceded to the LOSC in 2013.
[205] Article 8(2) and (3) of the CMATS.
[206] Each party to appoint one Minister appointed by the parties, or other such representatives of the governments.
[207] Article 9(1) of the CMATS.
[208] Ibid, Article 9(3).
[209] Article 11 of the CMATS.

objections from Australia initially, conciliation proceedings with Australia under the LOSC.[210]

5 Identifying and addressing challenges of provisional arrangements: a 'governance' perspective

Though provisional arrangements are both pragmatically and normatively appealing, their negotiation, successful conclusion, and implementation are challenging tasks. Several factors are necessary for their success.[211] This section discusses some of the prominent challenges of provisional arrangements, such as challenges associated with the conclusion and implementation of arrangements. This section draws on the governance framework (three pillars of governance), discussed in Chapter I, to illustrate factors that underpin successful/effective arrangements.

5.1 Challenges relating to conclusion of arrangements

One of the major initial roadblocks for provisional arrangements is disagreements or non-acceptance of the other party's maritime claims.[212] The first step towards commencing negotiations on a provisional arrangement is the preparedness of each side to accept that the other state has a valid claim in the same maritime area, made in good faith and according to international law. Without acknowledgement that the other side has a plausible claim, it would be near impossible for the parties to come together to discuss how to manage their 'shared' maritime area pending delimitation. For example, negotiations, let alone the successful conclusion of a provisional arrangement in the Aegean Sea, between Turkey and Greece, is a distant possibility because both parties consider the others' claims to be unjustified.[213] Even though acknowledgement of overlapping claims does not impact or prejudice their position, as it stands, it is unlikely that they will agree to share jurisdiction and resources in

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[210] See, Chapter VII on Conciliation.

[211] For a discussion of political economic and legal factors influencing provisional arrangements see, Beckman et al (n 2).

[212] Yiallourides (n 2) 213.

[213] See for example, Letter dated 23 May 2016 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General (UN Doc A/70/900-S/2016/474*) 25 May 2016. According to Greece "unsubstantiated, unfounded and abusive allegations totally disregard the sovereign rights of other States, including Greece…[s]uch allegations go well beyond the rules of international law, by denying the entitlement of Greek islands to maritime zones, contrary to international law of the sea".

disputed maritime areas. However, total refusal of the other party's claim does not absolve states from the obligation 'to make every effort' to enter into provisional arrangements. Failing to consider sending an invitation for negotiations and failure to reply such invitation constitutes a breach of the obligation to make every effort to enter into provisional arrangements.[214]

Lack of political will is another important roadblock for provisional arrangements.[215] If there is no political appetite to enter into provisional arrangements such an arrangement cannot be forced upon the two states.[216] Existence of a political will means each side can negotiate effectively, by way of considering alternative proposals and making compromises to achieve the intended outcome. Moreover, political will is not only necessary to conclude but to ensure continued cooperative implementation of any provisional arrangement.[217] In this connection, mention must be made of the importance of friendly and good relations between states.[218] If bilateral relations of states are at a stage where parties are not even able to consider the proposals of the other side or are constantly going through stand-offs concerning disputed maritime areas, it would be challenging for those states to enter into and implement any provisional arrangement. For any arrangement to flourish in the long term, the bilateral relationship must be robust enough to sustain the arrangement even when the circumstances of governments change.[219] Again, this feeds into the point made in the Introduction regarding the dynamic nature of disputed maritime area governance. Change and development in the circumstances surrounding disputed maritime areas over time may not always be in the positive direction, however lamentable this may be.

Another significant complicator in the initial stages can be the existence of sovereignty disputes over land territory.[220] In such cases, especially if sovereignty disputes are highly politicised domestically, governments might feel under pressure from their

[214] *Guyana v. Suriname*, para 473-474.
[215] Beckman et al (n 2) 310-311.
[216] Gavin MacLaren and Rebecca James, 'Negotiating Joint Development Agreements' in Beckman et al (n 2) 139, 141.
[217] Schofield (n 10) 161.
[218] Beckman et al (n 2) 307.
[219] Schofield (n 10) 161.
[220] Beckman et al (n 2) 304.

electorates not to ‘surrender sovereignty’ over the features. While of course, it is possible to preserve such claims with ‘without prejudice’ clauses, explaining the intricate details of legal arrangements between two states to the public is not an easy task and there will always going to be critics of such rapprochement between disputing states.

5.2 Design and content of arrangements

After the conclusion of an arrangement, states must continue to make efforts to ensure continued cooperation as per the arrangement. In this regard, various approaches underpin the success of arrangements. As discussed in Chapter I, one of the three pillars of governance is institutions. The provisional arrangements surveyed above take varying approaches to institutional aspects of disputed maritime area management. Sometimes new institutions are established and entrusted with consultative and advisory functions concerning the implementation of the arrangement broadly, and sometimes concerning specific aspects such as fishing quotas etc. Sometimes they are granted regulatory powers concerning the management of the disputed maritime areas. At times, states make use of existing cooperative institutions between them. The value of including institutional arrangements in provisional arrangements is that they are a forum for continuing and potentially complex discussions about the implementation of the provisional arrangements and any disagreement that may arise concerning the implementation. Another advantage is that a consultative institution meeting regularly can foster a close political relationship between disputing states which is essential for the running of the arrangement and also overcoming of challenges that states may face. Therefore, the institutional design is an important factor underpinning successful cooperative arrangements.

It is also important that provisional arrangements take into account and are based on principles. As discussed in Chapter II, peaceful settlement of disputes is part of the principles of governance in the context of disputed maritime areas, and as such, another critical element of effective provisional arrangements is dispute settlement procedures. As obvious as it may be, the conclusion of provisional arrangements does not remove, outright, further disputes or disagreements between disputing states. Therefore, it is important that states address dispute settlement in their arrangements.

As seen above, some arrangements provide that states agree to a mechanism for dispute settlement, while others prescribe a certain mechanism, such as arbitration or conciliation. Whether states prefer a binding or non-binding outcome, it is important for the effectiveness of the arrangement to provide for a compulsory dispute settlement procedure.

A final note on dispute settlement provisions is that they must consider the potential relationship between dispute settlement procedures under the provisional arrangement and the dispute settlement mechanism set out in Part XV of the LOSC. This is because disputes over provisional arrangements may be considered a dispute concerning the interpretation or application of the LOSC, given that states recognise that their arrangement gives effect to articles 74(3) and 83(3) of the LOSC. Depending on whether states prefer, or not, to have recourse to the procedures under the LOSC, they must draft the dispute settlement provisions carefully. In this regard, states must pay particular attention to articles 281 and 282 of the LOSC.[221] If parties do wish to remove the possibility of application of Part XV of the LOSC, they must include in their agreement a clear statement of exclusion of further procedures.[222] This would opt the parties out of Part XV dispute settlement procedures if their chosen dispute settlement under their provisional arrangement does not resolve the dispute. Moreover, if parties choose a procedure with a binding outcome, that procedure applies in lieu of Part XV, unless they agree otherwise.[223] It is advisable, for effective management of disputed maritime areas and provisional arrangements, that, the LOSC and its procedures are not removed from the picture.

Another issue relates to the content of the provisional arrangements. This chapter discusses examples of two categories of provisional arrangements, joint management, and provisional boundary. Most provisional arrangements entered into to date relate to the development of hydrocarbons. While of course it has been important for states

[221] Application of these articles are further discussed in Chapter VII.
[222] Article 281 of the LOSC; PCA, Arbitration Between the Republic of the Philippines and the People's Republic of China, UNCLOS Annex VII Arbitral Tribunal, Decision of 29 October 2015 on Jurisdiction and Admissibility, para 223 available online at: https://pca-cpa.org/en/cases/7/ [hereinafter '*South China Sea Arbitration Award on Jurisdiction and Admissibility*']
[223] Article 282 of the LOSC; *South China Sea Arbitration Award on Jurisdiction and Admissibility*, para 224.

to provide for their domestic energy needs, such arrangements with a limited scope leave important issues, such as management of living resources and protection of the marine environment to the side, pending delimitation.[224] As pointed out in the Introduction of this thesis, issues surrounding disputed maritime areas are not merely about the exercise of sovereign rights. There are broader values, norms, and processes that disputed maritime areas cannot and should not be isolated from. As such, it is neither desirable nor in accordance with the normative framework to disregard obligations of concerning the management of living resources and conservation of the marine environment to only focus on the exercise of rights. While states have the discretion to negotiate and enter into any provisional arrangement that they consider suitable, both from a governance perspective and based on the normative framework, states should enter into broader arrangements, some examples being the arrangements between the UK and Denmark and Timor-Leste and Australia.

Last but not least, provisional arrangements agreed bilaterally cannot always address all issues. For example, third states' rights and interest may be ignored, whom may also have an interest in the management of the disputed maritime area, for example in relation to fisheries and marine environmental protection. Furthermore, the resources and environment of the disputed maritime area may be part of a larger ecosystem which requires holistic management at the multilateral level to ensure objectives of sustainability, conservation and protection are achievable. As discussed above, the UK and Faroe Islands, and Australia and Timor-Leste have opted for such an approach, recognising that not everything has to be, or can be, dealt with at the bilateral level. Regional/multilateral arrangements, which are discussed in Chapter V, can complement the governance efforts of disputing states by 'nesting' the bilateral arrangements inside a wider multilateral governance framework.[225]

[224] Davenport (n 65) 105.
[225] For example, in relation to fisheries management, states may agree at the bilateral level to flag-state based jurisdiction and to concurrent jurisdiction against third-party vessels, while they defer the decisions on applicable regulations and measures at the disputed maritime area to be established at the multilateral level through RFMOS, this would improve the effectiveness of measures by ensuring that same standards apply to all vessels.

6 Conclusion

The enthusiasm in the literature regarding the potential of provisional arrangements to assist states in the management of disputed maritime zones is merited. As discussed in this Chapter, the drafters of the LOSC also agreed that provisional arrangements would offer a way forward for states pending final delimitation. However, the obligation to enter into provisional arrangements is an obligation of conduct, as per the language 'make every effort'. Nonetheless, it always requires states to inform, notify and invite the other party in any activity concerning the disputed maritime areas.[226] These provisions in the LOSC provide states with a great degree of discretion to dictate the content of their provisional arrangements. The circumstances of each disputed maritime area dictate the contents of arrangements, such as the complexity of the legal and political situation between the states concerned, the number of states asserting claims, and of course, the priorities of states concerning the maritime area.

While some of the most popular arrangements pending delimitation deal with hydrocarbon development, this is by no means the only available option to states; neither should it be perceived as the only form of provisional arrangement that states may enter into. If states enter into provisional arrangement, they should ensure that the contents of their provisional arrangements are inclusive of their broader obligations under the LOSC, such as the protection of the marine environment and conservation and management of the living resources. States may have great flexibility in deciding the content[227], but they should not overlook such matters as adhering with principle of protection and preservation of the marine environment (including living resources) promote peaceful governance of disputed maritime areas and maritime security. Importantly, the principles of governance discussed in Chapter II, which promote stability and respect for disputing states concurrent rights and interests, can ensure success and longevity of provisional arrangements. As discussed in this chapter, shortcomings of provisional arrangements can be addressed through actioning of principles of governance discussed in Chapter II. In this context, the chapter has argued it is particularly important that states establish necessary institutional and dispute settlement frameworks (principle of peaceful settlement of disputes), as part

[226] See the discussion in section 3.2 above.
[227] Conciliation, discussed in Chapter VII, may prove helpful states in framing their discretion.

of their arrangements. The implication of principles of governance is that they can be used as guidance in devising more effective provisional arrangements.

If there are more than two states with claims to the same maritime area, it is likely to be a more challenging endeavour to agree on a provisional arrangement given multiple competing interests. While states must attempt to enter into a provisional arrangement as per the rule under the LOSC and the principle of cooperation, some examples discussed above illustrate that some bilateral arrangements are 'nested' within a broader multilateral institutional framework, whereby states cooperate on the basis of agreements and objectives agreed through multilateral institutional frameworks in managing disputed maritime areas.[228] However, even on a bilateral basis provisional arrangements come with challenges. Provisional arrangements require not only political will but also a commitment from the parties to enter into and sustain the agreement in the long term, pending delimitation as well as well thought through mechanisms to ensure effective governance and address challenges and disagreements between states when they arise. As the survey above illustrate, at times, arrangements may end up in deadlock because one party refuses to implement them due to disagreements. Non-implementation disputes may be subject to dispute settlement provisions, if available under the arrangement. If not, or if the procedure fails to settle the dispute, such disputes may also be subject to dispute settlement under the LOSC.[229] For the reasons discussed in this chapter, provisional arrangements are attractive but their negotiation, especially if a broad arrangement is to be concluded, would not be straightforward, and in fact, may prove as challenging as the delimitation agreement itself.

[228] See the discussion and conclusions in Chapter V.
[229] For further discussion of this issue, see Chapters VI and VII.

Chapter IV: Unilateralism

1 Introduction

The normative framework previously discussed in this thesis promotes cooperation between disputing states based on the principles (discussed in Chapter II) and under the LOSC, which obliges states to make every effort to enter into provisional arrangements. However, in practice, unilateralism in disputed maritime areas is not a rare occurrence. [1] Unilateral actions of states make news all over the world and they are also documented by academics with interest in this phenomenon.[2] Unilateralism in this chapter signifies actions, activities and measures undertaken by a claimant state in a disputed maritime area without notifying or seeking cooperation of the other claimant.[3] Claimant states at times may be tempted to exercise coastal state rights in disputed maritime areas without cooperation with the other claimant in the hope of securing access to resources and/or strengthening their claims to the maritime area in question.[4] That initial unilateralism would usually trigger a response from the other claimant, either in the form of a similar activity undertaken to protect its claims, or another response, ranging from diplomatic protest to use or threat of force to avoid claims of acquiescence in the other state's claim over the disputed maritime area.[5] In general, unilateralism deteriorates the bilateral relationship between the two claimant states as confirmed by the examples of Guyana and Suriname and Ghana and Côte d'Ivoire.[6] Therefore, this chapter considers how the normative framework deals with unilateralism.

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[1] For example, acts of unilateralism are observable in the disputed maritime area between Guyana and Venezuela, in disputed maritime areas between Greece and Turkey in the Aegean and Cyprus and Turkey in the Eastern Mediterranean.

[2] See, for example Youri van Logchem, 'Acts of Unilateralism in Disputed Maritime Areas: A Survey of State Practice' in Youri van Logchem, *The Rights and Obligations of States in Disputed Maritime Areas* (Cambridge University Press 2021) 249-288.

[3] See Daniel Bodansky 'What's so bad about unilateral action to protect the environment' (2000) 11 *European Journal of International Law,* 339, 340 (defining 'unilateralism' as one state proceeded independently, on its own authority, with minimal (if any) involvement by other nations. That is the nub of unilateralism").

[4] However, such actions are futile, at least, before an international court or tribunal.

[5] Van Logchem (n 2) 4-5.

[6] These examples will be further discussed in this chapter.

In *Guyana v. Suriname*, the Tribunal ruled that while some unilateral acts are not contrary to the obligation of restraint found in articles 74(3) and 83(3) of the LOSC, Guyana's unilateral exploratory drilling and Surinamese patrol boat's threat of force against the oil rig were in breach thereof.[7] According to articles 74(3) and 83(3) of the LOSC, "[p]ending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, *not to jeopardize or hamper the reaching of the final agreement*".[8] These obligations are interlinked. As discussed in Chapter III, the first limb places an obligation on states to seek provisional arrangements. The second limb places an obligation of restraint. This chapter focuses mainly on the second limb of the article.[9]

The obligation not to jeopardise or hamper[10] is a constraint on the conduct of states in relation to their disputed maritime areas. The case-law suggests that determination of a breach of the obligation of restraint, pursuant to articles 74(3) and 83(3) of the LOSC must be considered on a case-by-case basis. An act of unilateralism may be in breach of the obligation in one disputed maritime area, and not in another, because of the uniqueness of relations between different states.[11] Even when an act of unilateralism does not constitute a breach of this obligation, or put differently, even if all acts of unilateralism are not per se prohibited, is unilateralism consistent with 'governance' of disputed maritime areas?

The episode between Guyana and Suriname in their disputed maritime area is an example of how unilateralism can result in a chain of actions that may breach other rules of international law. Guyana's unilateral oil exploration activities, carried out by CGX Energy, erupted into a dangerous situation when Suriname sent patrol boats to confront the oilrig and drill ship, which resulted in a threat of use of force contrary to the LOSC and international law.[12] Claimant states undertaking unilateral activities

[7] *Guyana v. Suriname,* paras 482-483 and 486.
[8] Articles 74(3) and 83(3) of the LOSC [emphasis added].
[9] It is important to note that the two obligations are interlinked, see section 2.1.3 of this chapter. Therefore, there are references to the obligation to enter into provisional arrangements in this chapter.
[10] This thesis uses this term interchangeably with the obligation of restraint.
[11] Van Logchem (n 2) 120.
[12] *Guyana v. Suriname,* para 445.

whether it is licensing vessels to fish in the disputed maritime area, undertaking hydrocarbon exploration or exploitation or unilateral enforcement of fishing ban or imposition of an MPA, have the potential to mount tensions and erupt into a conflict between the two sides. Unilateralism from a bilateral legal perspective is problematic if acts or activities breach the obligation not to jeopardise or hamper owed to the other claimant state. However, from a 'governance' perspective and the normative framework, unilateralism should still be avoided to the extent possible, even if it does not breach the obligation not to jeopardise or hamper. Depending on how a state pursues unilateralism, unilateral activities may ignore the broader interests applicable to disputed maritime areas as well as obligations *erga omnes.* For example, unilateral actions may lead to ineffectiveness in relation to protection and preservation of the marine environment and resources, as unilateral efforts to exercise such jurisdiction in disputed maritime areas are likely to be disregarded or purposely breached by the other claimant.

Given that unilateralism is a phenomenon that is observed in various disputed maritime areas, it is important to address unilateralism within the normative framework discussed in this thesis. In doing so, this chapter first focuses on the obligation not to jeopardise or hamper in the LOSC, considering its judicial interpretation to provide a clearer understanding for the content and requirements of the obligation. This chapter then considers whether states are under an obligation to exercise restraint in relation to territorial sea and mixed disputes. Having considered some of the doctrinal questions in relation to this obligation of restraint, this chapter turns to consider whether unilateralism is consistent with the normative framework applicable to disputed maritime areas, making the case for why, from the perspective of normative framework and practical/policy, unilateralism is undesirable.

2 The obligation of restraint under the LOSC

The obligation not to jeopardise or hamper reaching of a maritime boundary agreement is one of the main obligations imposed upon states pending delimitation of

their maritime boundary.[13] This second limb of articles 74(3) and 83(3) of the LOSC aims to discourage conduct that could infringe reaching a delimitation agreement by imposing an obligation of conduct on claimant states, and as such, is "an important aspect of the Convention's objective of strengthening peace and friendly relations between nations and of settling disputes peacefully".[14] The literature on this obligation agrees that it does not imply that states may not undertake any unilateral activity in disputed maritime areas.[15] In other words, unilateral acts are not prohibited altogether. Rather than expressly ruling against or prohibiting certain acts or activities, the provision imposes an obligation of conduct for states concerned, especially when their relations are strained, to exercise mutual restraint.[16] However, it is important to identify whether an activity 'jeopardises or hampers the final agreement' from the perspective of claimant states for two reasons. First, it is necessary for establishing and ensuring that activities a claimant state wishes to undertake does not negatively impact the reaching of a final agreement. Second, it is necessary for establishing when one of the claimant states breach the obligation owed to the other claimant.[17] Therefore, this section considers following questions: (i) what are the standards for establishing whether an act or activity 'jeopardises' or 'hampers' the final agreement? and (ii) what is the geographical and temporal scope of this obligation?

2.1 Establishing a *breach of the obligation not to jeopardise or hamper*

The obligation seeks to discourage conduct by claimant states which could endanger reaching of a final agreement. While the aim of the obligation is clearly stated in the LOSC, the paragraph lacks any more detail in relation to what acts or actions have the effect of 'jeopardising or hampering the final agreement'. The ordinary meaning of the

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[13] The other two obligations include entering into provisional arrangements (see Chapter III) and submission of the dispute to a dispute settlement mechanism if no agreement on boundary is reached within a reasonable period of time (see Chapter VI).

[14] *Guyana v. Suriname,* para 465.

[15] David Anderson and Youri van Logchem, 'Rights and Obligations in Areas of Overlapping Maritime Claims' in S Jayakumar and R Beckman (eds), *The South China Sea Disputes and the Law of the Sea* (Edward Elgar 2014); Robin Churchill, 'International Law Obligations of States in Undelimited Maritime Frontier Areas' in Richard Barnes and Ronán J Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges* (Brill | Nijhoff 2021); Nicholas A Ioannides, 'The Legal Framework Governing Hydrocarbon Activities in Undelimited Maritime Areas' (2019) 68 *International and Comparative Law Quarterly* 345.

[16] Rainer Lagoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1984) 78 *The American Journal of International Law* 345, 362.

[17] A claim for a breach of the obligation can be brought before international courts and tribunals (see discussion in Chapter VI).

words suggest that claimants must make every effort to make sure that their actions do not interfere, or put at risk, reaching of final agreement on maritime boundary. In *Guyana v. Suriname,* an international tribunal decided, for the first time, on the meaning and interpretation of articles 74(3) and 83(3) of the LOSC. The parties called upon the Tribunal to consider, as part of their request for delimitation of their maritime boundary, whether the obligation not to jeopardise or hamper were breached by Guyana's unilateral exploratory drilling and Suriname's threatening of the oilrig to leave the disputed maritime area.

2.1.1 To be 'informed' by standards developed in provisional measures jurisprudence

In the view of the Tribunal, the obligation does not preclude the undertaking of all activities in a disputed maritime area.[18] "In the *context of activities surrounding hydrocarbon exploration and exploitation,* two classes of activities in disputed waters are therefore permissible" said the Tribunal, clarifying that first class of permissible acts are those undertaken "pursuant to provisional arrangements" between the parties and the second class of permissible acts are composed of those which "although unilateral, would not have the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary".[19]

To ascertain which acts would, or would not, jeopardize or hamper the final agreement, the Tribunal referred to 'permanent physical change' standard. Explicitly drawing upon the pre-LOSC jurisprudence of the ICJ in the *Aegean Sea Continental Shelf*[20]*,* the Tribunal made a broad distinction between activities of the kind that would lead to permanent physical change, such as exploitation of oil and gas reserves, and those that are of 'a transitory character' (to use the words of the ICJ in *Aegean Sea Continental Shelf*) and would not lead to permanent physical change, such as seismic testing.[21] The Tribunal stated that "acts that do cause a physical change would have to be undertaken pursuant to an arrangement between the parties to be permissible,

[18] *Guyana v. Suriname*, para 465.
[19] Ibid, para 466 [emphasis added].
[20] *Aegean Sea Continental Shelf* (Provisional Measures) para 30.
[21] *Guyana v. Suriname*, para 467- 468.

as they *may* hamper or jeopardise the reaching of a final agreement on delimitation".[22] On the other hand, the Tribunal viewed that "unilateral acts which do not cause a physical change to the marine environment would *generally* fall into" the second class of acts that are permissible in disputed maritime areas.[23]

Based on the *Guyana v. Suriname* award, arguments have been made in the literature that the Tribunal's ruling mean drilling causes permanent change and hence it breaches the obligation not to jeopardise or hamper. For instance, Ioannides argues that the Tribunal in *Guyana v. Suriname* found that "drillings undertaken unilaterally are to be considered unlawful since they may jeopardize the reaching of a final agreement".[24] In relation to articles 74(3) and 83(3) of the LOSC, he maintains that "these particular provisions promote restraint and prohibit unilateral drilling lest the reaching of a final agreement is jeopardized" and concludes "that since unilateral drilling in undelimited maritime areas constitutes the gravest form of violation that might occur pending a delimitation because of the irreversible damage it causes and the serious risk it poses to reaching of the final agreement, it should be prohibited in every case".[25] While this argument has some weight, one must be cautious towards a *mutatis mutandis* application of the provisional measures jurisprudence and standards developed therein to determine breaches under articles 74(3) and 83(3) of the LOSC. It is important to take into account the subtle language used by the Tribunal while referencing the *Aegean Sea Continental Shelf Case.* The Tribunal in *Guyana v. Suriname* made the following observation in an important passage:

> …the regime of interim measures [provisional measures] is far more circumscribed than that surrounding activities in disputed waters generally. As the Court in the *Aegean Sea* case noted, the power to indicate interim measures is an exceptional one, and it applies only to activities that can cause irreparable prejudice.[26]

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[22] *Ibid*, para 467 [emphasis added].
[23] *Guyana v. Suriname,* para 467 [emphasis added].
[24] Ioannides (n 15) 361.
[25] Ibid, 364 and 368.
[26] *Guyana v Suriname*, para 469.

As acknowledged by the Tribunal, provisional measures, and circumstances of disputed maritime areas, where obligations under articles 74(3) and 83(3) of the LOSC apply, are not identical. Writing two years after the adoption of the LOSC and decades before the *Guyana v. Suriname,* Lagoni argued that "[provisional] measures of protection ordered by the ICJ may offer some *assistance* in finding convincing answers" to the question of which acts of states would jeopardise or hamper the reaching of a final delimitation agreement.[27] The Tribunal in *Guyana v. Suriname* also considers that being 'informed' by provisional measures standards are merited in the following passage:

> The cases [i.e., *Aegean Sea*] dealing with such [provisional] measures are nevertheless *informative* as to the type of activities that should be permissible in disputed waters in the absence of a provisional arrangement.[28]

To account for the differences between the two regimes, one can distinguish the subtle difference between establishing breaches of the obligation by analogy to provisional measures and being informed by the jurisprudence to understand what may breach the obligation not to jeopardise or hamper. Bearing in mind the differences between the two, it is reasonable to address obligations under articles 74(3) and 83(3) of the LOSC, with the guidance of provisional measures standard but not *mutatis mutandis*. Moreover, another point is worth making in relation to the language used by the Tribunal.

The Tribunal did not think that permanent physical change was the ultimate threshold in every case. While interpreting the meaning of the obligation not to jeopardise or hamper, the Tribunal was informed by the provisional measures jurisprudence reasoning that "acts that do cause physical change… *may* hamper or jeopardise the reaching of a final agreement on delimitation".[29] One must bear in mind the subtle nature of the Tribunal's language which has been *italicised* here to draw emphasis.

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[27] Lagoni (n 16) 365 [emphasis added].
[28] *Guyana v. Suriname,* para 469.
[29] Ibid, para 467 [emphasis added].

Consider the following passages from the Award, where, the Tribunal opined that activities engendering physical change to the marine environment "*could be perceived to, or may genuinely,* prejudice the position of the either party in the delimitation dispute, thereby both hampering and jeopardizing the reaching of a final agreement".[30] Moreover, the Tribunal merely said "[*s*]*ome* exploratory drilling *might* cause permanent damage to the marine environment.[31] Evidently, the Tribunal refrained from making definite conclusions as to whether permanent physical change would breach the obligation in all cases. Furthermore, the Tribunal used language such as, "in the present case" and "in the circumstances at hand", to qualify its findings in relation to seismic testing and exploratory drilling that was under consideration in the context of the case.[32] Therefore, generalisations must be approached with caution regarding permanent physical change standard as the definite benchmark for the determination of compliance with obligations in disputed maritime areas.

Applying the permanent physical change, a provisional measures standard, to establish a list of activities or acts that breach the obligation not to jeopardise or hamper would prove inadequate and unsatisfactory.[33] Such an exhaustive list of acts would fail to address diverse and broad circumstances of different disputed maritime areas, as not all acts and activities may engender physical change to the marine environment, but nevertheless may make reaching an agreement on boundary more difficult.[34] In other words, permanent physical change to the marine environment standard may be appropriate when parties undertake an activity involving the seabed, but it may not when activity concerns the water column or actions beyond the disputed maritime area which may still impact on parties' ability to reach an agreement.

2.1.2 Other factors for determining a breach

According to the Tribunal, Suriname's threat of the oilrig in the disputed maritime area breached the obligation not to jeopardise or hamper the reaching of the final delimitation agreement – while also threatening international peace and security.[35] Of

[30] *Guyana v. Suriname,* para 480 [emphasis added].
[31] Ibid, para 481 [emphasis added].
[32] Ibid.
[33] Sep. Op. of Judge Paik in *Ghana v. Cote d'Ivoire,* p. 178, para 7.
[34] Ibid.
[35] *Guyana v. Suriname,* para 484.

course, the act concerned was not judged upon the permanent physical change standard, as it was irrelevant for the act of threatening to use force against an oilrig, if it did not leave the disputed maritime area. The factors that must be considered for establishing breaches of the obligation depends on the facts of a case, such as the type of act or activity in question and the relations between states etc. This is because each disputed maritime area is likely to show different characteristics and facts. As such, listing and "identifying in general and in the abstract, what are permissible activities and what are not" would not serve the purpose of articles 74(3) and 83(3) of the LOSC.[36] Therefore, flexibility is necessary as it enables courts and tribunals to take into account diverse and unique circumstances of each case into account.

Even the provisional measures jurisprudence has demonstrated such flexibility. By balancing different rights and issues at play in the case between *Ghana v. Côte d'Ivoire,* the Special Chamber allowed the continuation of existing drilling activities in the order of provisional measures.[37] As such even when the sea-bed related activities are in question, it must not be assumed that, just because the activity has physical impacts, the obligation not to jeopardise or hamper is automatically breached. However, vice versa is also true, it should not be assumed that all other activities that "seemingly have no permanent physical impact on the marine environment are necessarily legally permissible".[38] Fietta has questioned, in his analysis of *Guyana v. Suriname,* whether the permanent change to the seabed standard is appropriate in determining breaches of the obligations, noting the technological developments in seismic surveys since the *Aegean Sea Continental Shelf* order:

> Unilateral seismic exploration could therefore, in some circumstances, significantly alter the status quo as regards the comparative levels of knowledge of two neighbouring coastal states about the value of all (or part) of a disputed maritime area. Such a disequilibrium in knowledge between

[36] Sep. Op. of Judge Paik in *Ghana v. Côte d'Ivoire,* paras 6-7.
[37] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 99; Natalie Klein, 'Provisional Measures and Provisional Arrangements' in AO Elferink, T Henriksen and SV Busch (eds), *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* (Cambridge University Press 2018) 117-144, 137 and 142.
[38] Constantinos Yiallourides, *Maritime Disputes and International Law* (Routledge 2019) 169.

two states could, in many cases, make a final delimitation agreement more difficult to obtain. [39]

Therefore, in the words of Judge Paik "permanent physical change to the marine environment…may be considered one of several relevant factors but should not be applied as a hard and fast threshold of jeopardizing or hampering the reaching of the final agreement".[40] Put simply, a case-by-case basis decision on whether an act or activity jeopardizes or hampers the final agreement is more appropriate for disputed maritime areas. The relevant factors for determination of breaches must be dictated by the circumstances and facts of a case, rather than applying select factors to all situations. The question that remains is then, what are other factors that may inform the determination of breaches of the obligation not to jeopardize or hamper the reaching of the final delimitation agreement?

Although not strictly an obligation of result, and in fact the case-law characterises the obligation not to jeopardize or hamper as an obligation of conduct[41], it also carries a result-oriented notion. In other words, activities undertaken in disputed maritime areas should be judged based on their effects on the reaching of a final agreement. In this connection, effect of the act or activity on the rapport between states are important. The perceptions of the parties, in the form of 'objections' is confirmed to be relevant, albeit implicitly, in case-law both in *Guyana v. Suriname* and *Ghana v. Côte d'Ivoire*.[42] For example, in *Guyana v. Suriname*, the Tribunal verified that seismic testing, an example where an activity without a permanent physical impact may nevertheless cause a breach where there are objections, did not breach the obligation not to jeopardise or hamper.[43] This was because"[i]n the present case, both parties authorised concession holders to undertake seismic testing in disputed waters, and these activities did not give rise to objections from either side" and therefore "[i]n the circumstances at hand…unilateral seismic testing is [not] inconsistent with a party's obligation to make every effort not to jeopardize or hamper the reaching of a final

[39] Stephen Fietta, 'Guyana/Suriname' (2008) 102 *American Journal of International Law* 119, 127.
[40] Sep. Op. of Judge Paik in *Ghana v. Cote d'Ivoire*, para 7.
[41] *Ghana v. Côte d'Ivoire*, para 627.
[42] *Guyana v. Suriname,* para 475 and 481; *Ghana v. Côte d'Ivoire,* para 147.
[43] *Guyana v. Suriname,* para 481.

agreement".[44] There seems to be an implicit suggestion here that, had there been objections from either side to seismic testing, the Tribunal's finding on the obligation not jeopardize or hamper could have been different.

Moreover, in *Guyana v. Suriname* the Tribunal focused on Suriname's general conduct in handling the dispute with Guyana, how it pursued negotiations and its diplomatic, or rather non-diplomatic, manoeuvres in the context of the dispute.[45] Suriname's conduct, in particular its threat of use of force, was the reason of Suriname's breach of the obligation not to jeopardize or hamper.[46] In addition, economic development also featured as a factor in *Guyana v. Suriname* warning that "courts and tribunals should also be careful not to stifle the parties' ability to pursue economic development in a disputed area during a boundary dispute, as the resolution of such disputes will typically be a time-consuming process".[47]

Based on the discussion above in relation to factors that courts and tribunals have taken into account (either explicitly or implicitly) a non-exhaustive list of factors emerges. The need for economic development, the level of objections/acquiescence, the manner in which acts are undertaken[48], and permanent physical may be relevant to take into account, through a balancing act, depending on the circumstances of each case.[49] More specifically, for instances in terms of exploitation of natural resources, a relevant factor to determine breaches may be whether the resources are renewable or non-renewable and whether sustainable practices are employed by the state carrying out such activities. In sum, all relevant factors need to be taken into account together with the broader context of the relations between states as well as the impact of the conduct/activity in question on the final agreement.

2.1.3 Two interlinked obligations

The Tribunal in *Guyana v. Suriname* implicitly explained the connection between obligations of provisional arrangements and not to jeopardise or hamper, while dealing

[44] Ibid.
[45] *Guyana v. Suriname*, paras 483-484.
[46] Ibid*,* para 484.
[47] *Guyana v. Suriname*, para 470.
[48] See section 2.1.3 below.
[49] Ibid, see also the Sep. Op. of Judge Paik in *Ghana v. Côte d'Ivoire,* para 10.

with their interpretation and application to the facts of the case. According to the Tribunal, unilateral acts that cause a physical change to the marine environment (in this case exploratory drilling of the seabed) are generally comprised as activities that can be undertaken "only jointly or by agreement between the parties" pursuant to the obligation to make every effort to enter into provisional arrangements.[50] This is due to the fact that these activities may jeopardize or hamper the final agreement.[51] As such, states should make every effort to enter into provisional arrangements. As discussed above, since the unilateral seismic test did not raise any objections by either party, they were able to undertake that activity without jeopardizing or hampering the final agreement, and as such, without having to conclude a provisional arrangement to undertake that activity.

Although the Tribunal does not say it explicitly, it can be deduced on the facts that since Guyana's exploratory drilling (unilateral) faced objections[52] from and failed to engage Suriname in the process of exploratory drilling via negotiations[53], exploratory drilling breached the obligation not to jeopardize or hamper.[54] If one of the parties react and object to unilateral activities of the other in disputed maritime areas, the other state should ensure that they are not aggravating the dispute by continuing their activities, as per the principle of non-aggravation.[55] Moreover, in those circumstances states should follow the principle of cooperation[56] and negotiate with a view to enter into provisional arrangements of a practical nature on the matter, this becomes especially pertinent if the acts cause permanent physical change.[57] This argument is verified by Tribunal's advice to Suriname, which is an authoritative interpretation of the obligation not to jeopardise or hamper, to negotiate rather than resorting to threat of force in responding to perceived breaches of the obligation not to jeopardise or hamper to negotiate, and "*if bilateral negotiations* failed to resolve the issue", to initiate

[50] *Guyana v. Suriname,* para 480.
[51] Ibid*,* para 467 and 480.
[52] Suriname sent a diplomatic note and a *note verbal* on separate occasions to Guyana, see *Guyana v. Suriname,* para 475.
[53] *Guyana v. Suriname,* para 477.
[54] This goes back to the argument made earlier in this chapter that various factors influence the determination of a breach, see section 2.1.2 above.
[55] See the principles of governance discussed in Chapter II.
[56] See the discussion of the principle in Chapter II.
[57] Yoshifumi Tanaka, Art 74, MN 36 in Alexander Proelss, *UNCLOS: A commentary* (Beck, Hart, and Nomos 2017) in Tanaka see footnote 138.

compulsory dispute settlement procedures (also the principle of peaceful resolution of disputes discussed in Chapter II).[58] Thus the rhetoric of the Tribunal conveys an important detail about the relationship between the obligations.

Expanding a little further than the Tribunal in *Guyana v. Suriname,* the Special Chamber in *Ghana v. Côte d'Ivoire* noted that paragraph 3 of articles 74 and 83 of the LOSC, "contains two interlinked obligations for the States concerned".[59] In interpreting the obligation not to jeopardize or hamper account has to be taken of paragraph 3, as a whole, as the fact that obligations to enter into provisional arrangements and not to jeopardize or hamper "are connected by the word 'and' is not without relevance.[60]

Consequently, it can be argued that breaches of the obligations under articles 74(3) and 83(3) of the LOSC is not a question of 'what' states do but rather 'how' they do it and thus, the impact it has on the reaching of the final delimitation agreement.[61]

2.1.4 Temporal and geographical scope of the obligation

There are two other important questions in relation to the obligation not to jeopardise or hamper: when is the obligation triggered and when does it terminate? The text of article 73(3) and 83(3) of the LOSC gives us important clues: with the terms 'pending agreement' and 'in this transitional period'. Therefore, in terms of their activation, the obligation not to jeopardise or hamper begin when parties are aware that they have overlapping claims and ends with the final agreement on delimitation. The same words apply to the obligation to enter into provisional arrangements, discussed in Chapter III. It is important to note that the obligation not to jeopardise or hamper would continue to apply even if parties conclude a practical arrangement for the governance of disputed maritime areas as final delimitation agreement is yet to be concluded.[62]

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[58] *Guyana v. Suriname,* para 482 and 484.
[59] Ibid*,* para 626.
[60] Ibid*,* para 629.
[61] "[I]t seems that, according to the Tribunal, what Guyana should be blamed for is not that Guyana has authorized its concession holder to drill an exploratory well in a known disputed maritime area but that Guyana failed to satisfy these cooperation requirements" in Jianjun Gao, 'Comments on Guyana v. Suriname' (2009) 8 *Chinese Journal of International Law* 191, 203.
[62] Van Logchem (n 2) 161-162.

In relation to the geographical scope of the obligation not to jeopardise or hamper there is not any explicit indication in the LOSC. The geographical scope of the obligation may be defined in various way.[63] An obvious geographical scope for the obligation is activities within disputed maritime areas, where claims or entitlements overlap.[64] However, this interpretation does not easily fit with the possibility that acts or activities outside the disputed maritime area may still complicate the delimitation process. On the other hand, it would be too broad to include acts between states that are of a general nature or relate to other events, which may have detrimental effect on the relationship between two states. Therefore, it seems logical not to limit the geographical scope of acts to the disputed maritime area, but at the least, there must be a relation between the act and the disputed maritime area.[65]

2.2 An obligation of restraint for territorial sea and mixed disputes?

While there is an explicit obligation of restraint in relation to the EEZ and Continental Shelf delimitation disputes in the LOSC, there is uncertainty whether such an obligation also exist in relation to certain territorial sea and mixed disputes.[66] Even if there is not a specific rule in the LOSC, the principles of governance discussed in Chapter II still guides states' behaviour in these circumstances. With that in mind, one can argue that there is an implicit obligation of restraint (a specific form of the principle of non-aggravation/mutual restraint) on claimant states in relation to disputed territorial sea areas in article 15 of the LOSC. However, due to the caveat included in the text that obligation may be inapplicable in some circumstances. As such, one needs to consider the normative framework applicable in those circumstances. Moreover, mixed disputes, involving issues of sovereignty are not strictly about 'interpretation or application of the Convention' and therefore, it is questionable whether the rules in the LOSC apply to such circumstances. This section aims to establish whether the obligation of restraint found in articles 74(3) and 83(3) of the LOSC may be applied by analogy.

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[63] Ibid, 163.
[64] Tanaka (n 57) MN 29.
[65] Van Logchem (n 2) 165.
[66] Clive R Symmons, Article 15 MN 22 in Alexander Proelss, *UNCLOS: A commentary* (Beck, Hart, and Nomos 2017); Lagoni (n 16) 367.

2.2.1 Pending delimitation of territorial sea disputes involving claims of historic title or other special circumstances

Article 15 of the LOSC provides the rules for 'delimitation of the territorial sea between states with opposite or adjacent coasts':

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the territorial sea of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

This article reflects the primary rule applicable in every maritime boundary delimitation, which is delimitation by an agreement between states. With the expectation of potential disputes between states over territorial sea delimitation, the Convention prescribes that in the absence or failing an agreement, states cannot exercise their sovereignty beyond the median/equidistant line.[67] In this way, the rule here, different from those under articles 74(3) and 83(3), entails a geographical limit when parties fail to agree on delimitation of the territorial sea. Moreover, it is also worth making another observation on article 15 of the LOSC. The word choices suggest that the automatically applicable rule may not be a *pro tempore* rule, i.e., one applicable pending agreement. First indication of this is the words "*failing agreement*" used in the first limb and second, "where it is necessary…. to *delimit* the territorial seas… in a way which is at variance therewith" which may be interpreted as prescribing delimitation of territorial sea based on the residual rule – 'median/equidistant line'.[68] The caveat being that in exceptional circumstance, in the cases of historic title or other special circumstances, this rule is inapplicable.

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[67] David Anderson, *Modern Law of the Sea Selected Essays* (Martinus Nijhoff Publishers, 2008) 387.
[68] Article 15 of the LOSC [emphasis added].

As the focus of this thesis is to explore the normative framework applicable to disputed maritime areas and as a corollary the obligations of states pending delimitation, it is unnecessary to dwell on the meaning of special circumstances, yet a remark is warranted. The term special circumstances is very broad and vague. Nonetheless it seems that historic title is an example of special circumstances given the textual configuration.[69] Other special circumstances confirmed by case-law are exceptional coastline configurations, such as concavity and convexity.[70] However, the concept of special circumstances has been applied restrictively by courts and tribunals to decide whether a provisional equidistance line required adjustment.[71] The main issue concerning this thesis in this context is that the LOSC does not specify a rule for the period pending delimitation of disputed territorial sea areas, where one or both of the parties claim historic titles or other special circumstances.

It has been suggested that this omission may be remedied by assuming obligations provided for in articles 74(3) and 83(3) of the LOSC by analogy to disputed territorial sea areas.[72] However, it has been pointed out that as the nature of entitlements that overlap are fundamentally different, meaning that there are overlapping sovereignties in territorial sea and overlapping sovereign rights in EEZ and continental shelf, the obligations under articles 74(3) and 83(3) of the LOSC cannot be applied *mutatis mutandis* to the former.[73] Regardless of which ever argument one finds convincing, the absence of a specific rule in the LOSC does not result in a gap in the normative framework. This is because, as discussed in Chapter II, framework includes principles of governance based on which states should exercise mutual restraint (i.e., the principle of non-aggravation).[74]

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[69] Symmons (n 66) MN 35.
[70] *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* Judgment, ICJ Reports 2007, p. 659, para 277.
[71] For discussion on this point see, Davor Vidas 'The Delimitation of the Territorial Sea, the Continental Shelf, and the EEZ: A Comparative Perspective' in AO Elferink, T Henriksen, & SV Busch (eds) *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* (Cambridge University Press, 2018), 33-61, 56-57.
[72] Lagoni (n 16) 367.
[73] Van Logchem (n 2) 103.
[74] See Chapter II.

2.2.2 Mixed disputes

As discussed in the introduction disputed maritime areas may be a result of one of three scenarios: a case of overlapping claims to maritime zones (without sovereignty dispute), a territorial sovereignty dispute (a pure territorial sovereignty dispute) which also creates disputes over the appertaining maritime zones, or concurrent issues of overlapping maritime areas requiring delimitation and disputes over sovereignty, for example over an island. This section is concerned with whether there is an obligation of restraint in the latter two scenarios, in other words, in cases of mixed disputes. Therefore, the following question needs to be considered: do articles 74(3) and 83(3) of the LOSC apply in cases of mixed disputes? The LOSC does not have an explicit rule on this matter. The academic debate on the issue is also not settled. Lagoni argues that, exceptionally, obligations under the articles 74(3) and 83(3) of the LOSC may arise where delimitation depend on the resolution of sovereignty issue over an island.[75] Anderson and Van Logchem are hesitant to the applicability of articles 74(3) and 83(3) of the LOSC to "disputes underlain by competing sovereignty claims".[76]

Answering the above question requires differentiating between the latter two scenarios.[77] For one, 'pure' territorial sovereignty disputes fall outside the purview of the LOSC.[78] An example of such a situation is Chagos, over which the UK and Mauritius dispute sovereignty. The sovereignty dispute between the UK and Mauritius is not at all about a dispute over delimitation of maritime boundaries, and as such, articles 74(3) and 83(3) of the LOSC is irrelevant. However, when and if the title to sovereignty over Chagos is resolved[79], it would mean that either the UK or Mauritius has a disputed maritime area with the Maldives. The conduct of states in the disputed maritime area, arising from entitlements of Chagos Island and Maldives, are subject to articles 74(3) and 83(3) of the LOSC. In fact, Judge *ad hoc* Oxman made this point in his separate and dissenting opinion to the decision on preliminary objections ruled by a Special Chamber of ITLOS on 8 January 2021, in the *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and the Maldives in the*

[75] Lagoni (n 16) 357.
[76] Anderson and van Logchem (n 15) 194.
[77] Van Logchem (n 2) 244-245.
[78] *Chagos MPA Arbitration (Mauritius v. United Kingdom)* paras 215-221.
[79] Notably, the UK and Mauritius has begun negotiating over the sovereignty of Chagos.

Indian Ocean (Mauritius v. Maldives).[80] Another example, of a pure sovereignty dispute whereby articles 74(3) and 83(3) of the LOSC is inapplicable, is the Falkland, South Georgia, and South Sandwich Islands dispute between Argentina and the UK. In such cases while the 'rules' (found in the LOSC) are not applicable, the principles discussed in Chapter II are applicable, as part of the normative framework. Therefore, states should act in light of the principles of non-aggravation/mutual restraint, peaceful resolution of disputes and on the basis of principle of cooperation states should consider giving effect to the principle of protection and preservation of the marine environment through a broader institutional framework. This thesis will return to these mixed disputes in Chapter V, where the thesis considers how multilateral institutionalised cooperation, for example through RFMOS, may contribute to the management of disputed maritime areas.

Returning to mixed disputes where there are both overlapping maritime areas, but also a sovereignty dispute over land territory, i.e., over an island or high tide feature, the obligations under articles 74(3) and 83(3) of the LOSC are applicable to the conduct of states pending delimitation. This is because, regardless of which way the sovereignty dispute is resolved, there is an overlapping maritime area that needs to be delimited.[81] As such, pending the delimitation of the overlapping area the rules in the LOSC would apply. Examples of such cases where parties are under an obligation to exercise restraint is Korea and Japan who dispute over title over Dokdo/Takeshima and China and Japan who dispute title over Senkaku/Diaoyu Islands. In consequence, the obligations may arise as soon as it is apparent that there exists an overlapping boundary to be delimited, regardless the concurrent sovereignty issue.[82]

3 Unilateralism – an undesirable phenomenon?

The normative framework (rules and principles) discussed in this thesis restricts the scope of unilateralism. However, the normative framework does not go as far to prohibit, outright, unilateral activities. As discussed above, whether a given act would

[80] *Mauritius v. Maldives* (Preliminary Objections) Sep. and Diss. Opinion of Judge *ad hoc* Oxman, paras 43-49.
[81] Van Logchem (n 2) 248.
[82] Lagoni (n 16), 357 and 362.

be in breach of the obligation not to jeopardise or hamper depends upon the circumstances of a case. One result of this flexibility in the obligation under the LOSC is that it may not seem too stringent to the parties and may arguably fail to constrain states' conduct. In addition, the latest jurisprudence in *Ghana v. Cote d'Ivoire,* in relation to sovereign rights pending delimitation, have fuelled such concerns that states may not exercise necessary restraint in disputed maritime as required pursuant to articles 74(3) and 83(3) of the LOSC.[83] As discussed in the Introduction, the Special Chamber ruled that acts or activities undertaken in the disputed maritime area by State A before delimitation, do not violate the sovereign rights of the State B, even if the area is later attributed State B. As such, unilateral action will not entail international responsibility of State A. While states may be more willing to act unilaterally because of perceived lack of legal consequences, there are other reasons that are more likely to motivate unilateralism, such as the 'oil imperative'; other resource exploitation needs; attempts to substantiate claims a larger maritime area, or; the desire to project power to maritime areas for political or geopolitical reasons.[84] For these and more reasons, unilateralism happens in a number of different regions of the world.

3.1 Why unilateralism should not be preferred

This section explores, based the normative framework discussed in this thesis and on practical/policy reasons, why states should not resort to unilateralism. In this connection, the principles discussed in Chapter II are relevant because they guide states and provide a framework for management of disputed maritime areas. The principles of cooperation (either through bilateral arrangements or multilateral institutions) and restraint are important in this regard. Given the existence of natural resources, of course there is temptation to use them for economic development, however, if intended for undertaking pending delimitation, states cannot claim exclusivity and hence must endeavour to cooperate with the other claimant(s). The normative framework discussed in this thesis directs states away from unilateralism, which fails to engage with the other claimant at all. At the least, the normative

[83] Sep. Op. of Judge Paik in *Ghana v. Cote d'Ivoire*, para 18; Yiallourides (n 38) 164-165.
[84] Although it is now confirmed by jurisprudence that states cannot rely on geographical scope of their unilateral activities as the basis of a maritime boundary, i.e., oil concession limits of the parties to *Ghana v. Cote d'Ivoire* could not be the basis of their maritime boundary, see *Ghana v. Cote d'Ivoire,* para 225; *Guyana v. Suriname Award,* para 390.

framework directs states to a particular form of unilateralism, which is transparent, based upon consultations and a good faith attempt to engage with the other state. The principles discussed in Chapter II is reinforced and strengthened by existence of specific rules in the LOSC.

As discussed previously in this chapter, unilateralism may be contrary to legal obligations of states in disputed maritime areas, pursuant to the obligation not to jeopardise or hamper. Furthermore, there is an additional legal obligation posed to states by the LOSC: states shall make every effort to enter into provisional arrangements pending delimitation as discussed in Chapter III. It has been argued that the LOSC displays a preference for provisional arrangements for the managing disputed maritime areas. If a party to a disputed maritime area considers that the other party carrying out unilateral acts falls short of these obligations, the state pursuing unilateralism may face accusations of breach of the obligations imposed upon states pending delimitation under the LOSC.[85] In this context, a further question arises, is whether the governance framework could or should be applied when the conduct adopted by one state is unlawful. First point to make is that each state is under an obligation not to comply with the legal parameters of conduct set by the LOSC, i.e., not to jeopardise or hamper the final agreement, and international law. If one of the disputing states is acting unlawfully, the other party should still follow the governance framework and principles identified by this thesis. This is because the governance framework offers avenues to address such unlawful unilateral conduct. In particular, the state facing unlawful conduct of the other should adhere to principle of peaceful resolution of disputes and resort to a third-party dispute settlement mechanism if the invitations to negotiate are not responded to. As will be discussed in Chapter VI, states have the option to request provisional measures to protect its rights and interests.

Furthermore, states have sovereign rights for the purposes of exploring exploiting conserving and managing natural resources in their EEZs.[86] As discussed in the Introduction to this thesis, these sovereign rights, pending delimitation are shared

[85] Indeed, the other claimant may submit such a dispute over obligations pending delimitation to legal or diplomatic dispute settlement procedure (further discussed in Chapters VI and VII).
[86] Article 56(1) of the LOSC.

between the two disputing states. To continue with the example of fishing, given the shared nature of the rights and resource in question, unilateral exploitation or conservation means essentially excluding the other party who also has an equal (potential) right in exploitation and conservation of the fish stocks. There is also another layer to this argument. If stocks concerned occur within the EEZ of two or more states, the LOSC prescribes that those states shall cooperate, either bilaterally or through sub-regional or regional organisations to coordinate measures for development and conservation of such stocks.[87] As argued in the Introduction resources in disputed maritime areas are shared and that they both have rights and interests in the disputed maritime area, disputing states should cooperate, pursuant to their obligation under the LOSC to coordinate measures for development and conservation of fish stocks. It would only be fair that of both claimant states participate in the decision that concerns their rights and interests in the disputed maritime area.[88] As such, unilateral management of fish stocks should not be preferred in disputed maritime areas.[89]

Finally, yet importantly, from a policy perspective the transboundary nature of marine environmental issues means that cooperation between states is essential for achievement of effective conservation and sustainable development of resources.[90] It is unlikely that unilaterally pursued policies, even if done with the best of intentions and pursuant to the obligation to protect and preserve the marine environment under article 192 of the LOSC, may not be effective. First factor for such ineffectiveness is of course, biological, and transboundary nature of ocean issues, including fisheries management. Second factor is perception and behaviour of the other claimant state in the face of unilateral exercise of the coastal state's right to manage fisheries.

[87] Article 63 of the LOSC.
[88] A point made in relation to the discussion on unilateral action to protect the environment, see Bodansky (n 2) 341.
[89] If parties are unable to cooperate bilaterally, the process of managing disputed maritime areas and its resources are available at the multilateral level, see Chapter V.
[90] This is clearly recognised in the LOSC as well as other treatise calling for cooperation of states in relation to environmental and global common's issues.

China's annual fishing moratorium covering the disputed maritime areas in the Yellow Sea, East China Sea, and South China Sea above 12th parallel[91] helps to illustrate the last point as to why unilateralism in this regard is less than ideal.[92] China has enforced this moratorium on fishing, applies to any vessel from any country, unilaterally every year since 1995 usually between May and August. China claims that the fishing moratorium forms part of its efforts to promote sustainability of fisheries and revive marine ecology.[93] The moratorium sparks protests and rejections every year from other claimants to the disputed waters of South China Sea, especially the Philippines and Vietnam.[94] Every year, reports of clashes between Chinese Coast Guard and fishing vessels of other claimants' spike in number.[95] There are two important implications of this unilateral moratorium.

First, fundamentally (or rather obviously) the unilateral moratorium increases the likelihood of conflict sparking between the disputing states given the reportedly militarised character of Chinese patrol activities. It may even be inevitable to come across situations like the 'CGX incident' between Guyana and Suriname, where 'law enforcement' turns to aggression or threat of use of force, contrary to international law.[96] Such an event is also likely to be in breach of the obligation not to jeopardise or hamper and as discussed above contrary to principles of governance. Second, while there is a real issue concerning sustainability of living resources in the South China Sea, it is doubtful whether a unilateral moratorium, objected by other claimants, is effective in achieving this 'intended result'. For Vietnam and Philippines accepting, or, not protesting China's unilateral ban on fishing in the South China Sea could be

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[91] Including Scarborough Shoal, the Paracel Islands, and the Gulf of Tonkin, but not Spratly Islands or the southern reaches of the nine-dash line.

[92] For more on China's fishing moratorium see, Asia Maritime Transparency Initiative (AMTI), *Fishing in Troubled Waters,* 17 July 2017, available online at: https://amti.csis.org/fishing-troubled-waters/

[93] Mahbi Maulaya, 'Truth behind China's fishing ban in the South China Sea' in *Asia and the Pacific Policy Society*, 24 June 2022, available online at: https://www.policyforum.net/the-truth-behind-chinas-fishing-ban-in-the-south-china-sea/.

[94] See the statement published on the Ministry of Foreign Affairs of Philippines regarding China's fishing moratorium, dated 30 May 2022, available online at: https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/30595-dfa-statement-on-china-s-unilateral-fishing-ban-in-the-south-china-sea; Remarks by the Spokesperson of the Ministry of Foreign Affairs of Vietnam regarding China's notice of fishing ban and its execution, dated 8 May 2020, available at: https://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns200510090211

[95] AMTI (n 92).

[96] Patricia Jimenez Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the *Guyana/Suriname* Award' (2008) 13 *Journal of Conflict and Security Law*, 49.

interpreted as acquiescence, and as a recognition of Chinese claims and right to enforce the ban in disputed maritime areas. As such, unilateralism hinders other claimants from joining conservation efforts. It is, therefore, not surprising that other claimants continue to allow their vessels to fish in disputed maritime areas, although at a cost. Vietnam lodged a diplomatic note of protest to China after Chinese Coast Guard "hindered, rammed and sunk" a Vietnamese fishing boat around the Paracel Islands.[97] Another note about the effectiveness of the fishing moratorium is that "commercially important fish are not breeding at the time of the fishing ban".[98] However, even if the moratorium contributed to conservation, when fishing activities aggressively resume after the moratorium ends, which is the problem with the South China Sea fisheries in the first place, risk of depletion of stocks remain as high as ever.[99]

3.2 A catalyst for resolution of the dispute?

Despite the number of reasons why states should not prefer unilateralism, in practice unilateralism is observable in disputed maritime areas. In this connection, there is a further point worth making in relation a possible consequence or implication of unilateralism. Unilateralism, at times, have resulted in resolution of the dispute (via the decisions of courts and tribunals) over maritime boundaries between states, for example, between Guyana and Suriname, and Ghana and Cote d'Ivoire. However, there are other instances where unilateralism has not brought states closer to the settlement of the dispute. Prominent examples include Turkey and Greece, and between China and other claimants in South China Sea, such as Philippines.

Arguably, Guyana's unilateral oil exploitations, and Suriname's threat of use of force against the oilrig triggered a process between parties, which led to the eventual submission of the dispute to arbitration for settlement of the maritime boundary. Three days after the CGX incident parties met to discuss "developments relating to the grant by Guyana of exploratory oil concessions in the area of maritime space claimed by

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[97] See remarks by the Spokesperson of the Ministry of Foreign Affairs of Vietnam, available at: http://www.mofahcm.gov.vn/mofa/tt_baochi/pbnfn/ns200404161321

[98] Hai Dang Vu 'A Bilateral Network of Marine Protected Areas Between Vietnam and China: An Alternative to the Chinese Unilateral Fishing Ban in the South China Sea?' (2013) 44 *Ocean Development & International Law*, 145-169, 146.

[99] Ibid.

both countries".[100] In this meeting, parties expressed their view that they had a responsibility to settle their differences in a peaceful manner, in accordance with the principles of international law and their determination to "put in place arrangements to end the current dispute over the oil exploration concessions".[101] Parties first resorted to diplomatic means, convening a joint technical committee, reconvening the joint meetings of the national border commissions and a subcommittee on hydrocarbons, to discussion possible provisional arrangements.[102] However, diplomatic efforts between 2000 and 2003 ended with no agreement. In February 2004, Guyana initiated arbitral proceedings to settle the dispute.[103] The arbitral tribunal rendered its award in September 2007 delimiting the overlapping entitlements of the parties and thus resolving the maritime boundary dispute.

In the case of *Ghana v. Côte d'Ivoire,* unilateralism triggered submission of the dispute for settlement before ITLOS. Ghana asked the Special Chamber of the ITLOS to declare the existence of a tacit boundary with Côte d'Ivoire.[104] Côte d'Ivoire argued that there was no tacit maritime boundary agreement, but rather overlapping claims requiring delimitation by the Special Chamber.[105] Both parties have undertaken unilateral oil exploration activities prior to delimitation of the maritime boundary, in fact, such practice going back decades (according to both parties as early as 1970s).[106] Côte d'Ivoire argued that Ghana's unilateral hydrocarbon activities faced protests from Côte d'Ivoire since 1992. Since the discovery of oil fields between 2007 and 2009, parties engaged in bilateral negotiations over their maritime boundary but no agreement was reached.[107] In September 2014, Ghana withdrew its declaration pursuant to article 298 of the LOSC and instituted arbitral proceedings in November 2014, pursuant to Annex VII of the LOSC, however the case was transferred to a

[100] Memorial of Guyana, Annex 81, available online at PCA website: https://pcacases.com/web/sendAttach/962
[101] Ibid.
[102] *Guyana v. Suriname*, para 153-155 and 478.
[103] Guyana's Notification under article 287 and Annex VII of the LOSC in the dispute concerning the maritime boundary between Guyana and Suriname and Guyana's Statement of Claim, 24 February 2004, available online at PCA website: https://pcacases.com/web/sendAttach/903
[104] *Ghana v. Côte d'Ivoire,* para 69.
[105] Ibid, para 71.
[106] *Ghana v. Côte d'Ivoire*, paras 121 and 131.
[107] Ibid, paras 191-192.

Special Chamber of ITLOS pursuant to a special agreement between the parties.[108] The Special Chamber delimited the maritime boundary between the parties.

Why did these instances of unilateralism lead to judicial settlement of the maritime boundary dispute? The motivating factor to finally settle overlapping claims seems to be, in these two cases, oil discoveries. The legal uncertainties surrounding disputed maritime areas as discussed in the Introduction, are stumbling blocks for both states wishing to exploit the oil reserves and the energy companies looking to make commitments and investment for their production alike.[109] Therefore, resolution of the dispute, where parties fail to enter into provisional arrangements, is essential to create and maintain stability for investments from oil companies. On the other hand, oil discoveries made pursuant to unilateral exploration activities in the disputed maritime areas may also complicate settlement of the maritime boundary. The *Somalia v. Kenya* case[110] demonstrates, Kenya's significant oil discoveries in the disputed maritime area meant that it refused to participate in the oral hearings (having raised preliminary objections and made written submissions) and rejected the delimitation decision of the ICJ.[111]

4 Concluding remarks

The normative framework discussed in this thesis endeavour to constrain unilateralism in disputed maritime areas. It is not surprising therefore that unilateral action in disputed maritime areas can be perceived as illegitimate or even illegal. Illegality or unlawfulness of a unilateral activity is considered based on states' obligation not to jeopardise or hamper the final agreement, pending delimitation pursuant to the LOSC. There is no doubt that as an obligation of conduct, the obligation not to jeopardise or

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[108] *Ghana v. Côte d'Ivoire*, para 1; Special Agreement available at ITLOS website: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/pleadings/C23_Special_Agreement.pdf.

[109] Yiallourides (n 38) 27; Paul M Blyschak, 'Offshore Oil and Gas Projects amid Maritime Border Disputes: Applicable Law' (2013) 6 *Journal of World Energy Law and Business,* 210, 211.

[110] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* Judgment of 12 October 2021, ICJ Reports 2021.

[111] Statements by Uhuru Kenyatta on the Judgment of the ICJ, available online at: https://www.president.go.ke/2021/10/13/statement-by-h-e-hon-uhuru-kenyatta-cgh-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-on-the-international-court-of-justice-judgement-in-maritime-delimitation-ca/#link

hamper constrains claimant states' behaviour during the period pending delimitation. Unlike some arguments in the literature, this thesis argues that which acts, or activities breach the obligation not to jeopardise or hamper is context dependent. It was argued in this chapter that permanent physical change is not the sole factor that needs to be taken into account, and it may not always be relevant. Factors to take into account should be dictated by the circumstances of the case and an overall assessment of the situation is necessary to determine breaches of the obligation not to jeopardise or hamper. Importantly, the perceptions of parties and the propensity of activities in question to risk final agreement on delimitation.

The normative framework constrains unilateralism (the rule in the LOSC and the principles of governance) and promotes cooperation. Therefore, one of the main conclusions of this chapter is that at the least, unilateralism should be transparent, based upon consultations and a good faith attempt to engage with the other state. As discussed in Chapter III, disputing states are under an obligation to make every effort to enter into provisional arrangements. This seems to be the preferred option of the LOSC in relation to conduct of activities in disputed maritime areas. A state failing to comply, or act in accordance with obligations in articles 74(3) and 83(3) of the LOSC may face long and costly proceedings before either judicial or diplomatic dispute settlement procedures.[112]

In addition, coastal states are assigned important duties in relation to management and conservation and preservation of the marine environment and its resources. These duties are of course not straightforward to carry out, as both claimant states have equally valid entitlements and therefore sovereign rights and jurisdiction over the disputed maritime area. Nonetheless, given that both the disputing states and the international community have interests in the protection and preservation of the marine environment, unilateralism is an ineffective option, falling short of principles of governance. In this connection, disputing states must take into account that the marine environmental issues, which are interconnected and transcend human-made borders,

[112] This thesis considers the role of courts and tribunals in Chapters VI. Chapter VII discusses why and how conciliation may contribute to the process of disputed maritime area management.

can only be effectively addressed by cooperation between states, at the least bilaterally (discussed in Chapter III) but also at the multilateral level though institutions (Chapter V).

Chapter V: The role of regional cooperation in disputed maritime areas

1 *Introduction*

So far, this thesis has mainly discussed the rules and principles, which make up the two pillars of governance, in the context of disputed maritime areas as well as conduct expected of based on this normative framework. The importance of institutions (third pillar of governance) for disputed maritime areas has been discussed to some extent Chapter III, in the context of bilateral arrangements. This chapter broadens the perspective and focuses on regional institutional cooperation to answer both the main research question and the sub-question: what is the role of institutions in managing disputed maritime areas?

It has already been discussed in this thesis that there are pressing and common concerns of the international community in relation to oceans, such as the protection of the marine environment, conservation of living resources, and protection of rare and fragile marine ecosystems, which are amongst significant maritime security issues.[1] As a corollary, coastal states have obligations *erga omnes* to protect and preserve the marine environment and its resources (part of the normative framework for managing disputed maritime areas[2]). These common concerns and the substantive rules of the LOSC tends to be overlooked in relation to disputed maritime areas within a strict bilateral legal analysis of disputed maritime areas. Bringing them to the frame of analysis and focusing on multilateral institutions, which are developed to respond to these common concerns by the international community, is worthwhile for two reasons.

First, cooperation at the multilateral level over 'common concerns' complements actions taken at the bilateral level, or, if there is no arrangement at the bilateral level, cooperation at the multilateral level 're-characterises' and 'transforms' questions of

[1] See the Chapter I.
[2] Principle of protection and preservation of the marine environment (discussed in Chapter II).

disputed maritime area management into a 'collective action' question, thereby 'blending' the dispute between states at a larger 'platform'. In this way, regional institutions contribute positively to the management of the dispute and disputed maritime areas. Maritime security, broadly understood, in disputed maritime areas can be addressed, maintained, and improved collectively through cooperation via regional institutions that deal with marine environmental protection and fisheries addressing threats to maritime security, such as pollution and illegal fishing. Second, it enables this thesis to identify challenges posed by disputed maritime areas to these institutions – which are likely to undermine the effectiveness of their measures to achieve their objectives concerning the 'common concerns'. Identifying the challenges paves the way for understanding and offering 'best practice' or ways to overcome these challenges.[3]

Notably, there are some 'successful' cases of regional cooperation including disputed maritime areas and disputing states. In such instances, claimant states have set their disputes aside, which they may be unable or unwilling to resolve for the time being, whether it is an unresolved maritime boundary or a mixed dispute, to cooperate in a multilateral institutionalised governance framework.[4] The progressive nature of such frameworks means that they facilitate and offer a way of building up trust and confidence as everyone works toward a common goal. This does not however imply that there are no challenges in implementing the agreed regional cooperation framework and enforcing adopted measures.[5] There are always challenges associated with implementation, even when disputed maritime areas are not an issue.[6]

This chapter explores particular attention to how regional multilateral frameworks can diffuse tensions between states in the name of common goals and investigates how

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[3] Offering ways to overcome the challenges are important because regional states relate more appropriately to and care deeply about the regional area that needs to be managed and it may potentially be easier to achieve a greater level of cooperation and targeted measures among regional states than that is achievable at the global level concerning these common concerns. Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart, 2010) 482.

[4] Mostafa K Tolba, *Global Environmental Diplomacy: Negotiating Environmental Agreements for the World, 1973-1992* (MIT Press 1998) 42.

[5] Challenges are further discussed below in section 3.

[6] Issues of compliance/implementation and effectiveness of regional environmental agreements, including those that are under discussion in this chapter, are important but they go beyond the scope of this chapter.

bilateral disputes between states create challenges at the multilateral level. Section 2 begins by offering observations on regional governance. After the preliminary observations, Section 2 considers the relevance of regional governance frameworks. In doing so, it provides an overview of the concept of regionalism in the context of the law of the sea and justifies the relevance of regional governance, by discussing the importance of multilateral cooperation in the context of disputed maritime areas and exploring the role accorded to regionalism in relevant provisions of the LOSC. Then, Section 2 introduces a selection of regional frameworks explaining the reasons behind their selection and providing a brief overview of aspects that are important from a governance perspective, as well as the associated disputes between states that fall within the area of competence of selected regional bodies. The experience in each region is considered to understand the role of multilateral institutionalised frameworks in managing disputed maritime areas. This prepares the groundwork for the subsequent discussion in section 3, which focuses on the implications of disputed maritime areas on these frameworks. Finally, section 4 concludes the chapter by providing reflections on the importance of regional governance frameworks for disputed maritime areas and some lessons for better managing disputing states within multilateral governance frameworks.

2 Regional governance frameworks

Preliminary to the discussion in this chapter, it is important to address and distinguish regional governance discussed in this chapter the cooperative arrangements at the bilateral level. Management at state to state or unit levels and at the multilateral level are complementary to each other. In terms of substance, provisional arrangements generally focus on the exploration of natural resources, as discussed in Chapter III.[7] Regional cooperation frameworks typically address issues of the protection of the marine environment and conservation of shared resources, or 'commons', particularly with respect to renewable resources. The ends sought by multilateral mechanisms are to provide effective protection and preservation of the marine environment and biodiversity by setting standards and facilitating harmonisation of actions/policies on

[7] Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (Martinus Nijhoff Publishers, 2004) 140-141.

these issues. Because regional governance deals with concerns shared by the international community, regional institutional frameworks involve not only the disputing states, but also other states of the region, and sometimes also extra-regional parties.[8] In the case of RFMOs, Distant Water Fishing Nations (DWFNs). Given the nature of issues that concern regional institutions and objectives of such institutions, the geographical competence of such institutions includes both areas under national jurisdiction and beyond national jurisdiction. However obvious, there is another point to remember. Regional cooperation frameworks exist independently. In other words, their establishment does not rest on the existence of a disputed area. Whereas bilateral arrangements are specifically about disputed maritime areas, cooperation through regional institutions is not the immediate response of claimant states for the management of their disputed maritime areas. Rather, existing or established regional mechanisms may indirectly affect disputed maritime areas and the relations of disputing states.

2.1 *The concept of 'region' in the context of the law of the sea*

The purpose of the LOSC is "to articulate a comprehensive, uniform and global legal order for the world's oceans". [9] For that purpose one of the important approaches of the LOSC is the development of regional mechanisms. In this regard, one finds various references, in certain contexts, to regional approaches in the LOSC. For example, the LOSC provides for regional cooperation in enclosed and semi-enclosed seas.[10] A regional approach is also generally significant for the implementation of the LOSC provisions in relation to fisheries management and protection of the marine environment.[11]

Yet, one cannot find definitions of 'region' or 'regional' in the LOSC. These terms constitute a set of concepts that help "define the physical (whether real or artificial)

[8] Sometimes participation of extra regional parties is problematic. For example, one of China's conditions on participation in regional seas body of COBSEA and other projects was that no extra regional states would be involved.
[9] Alan Boyle, 'Globalism and Regionalism in the Protection of the Marine Environment' in D Vidas (ed) *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention* (Cambridge University Press, 2000) 21
[10] Articles 122 and 123 of the LOSC.
[11] Article 61 (concerning conservation of living resources) and Article 197 of the LOSC (concerning protection and preservation of the marine environment).

and intellectual limits of the subject matter in a given process".[12] The literature distinguishes three ways in which the terms have been used in the context of law of the sea. These are formal, functional, and political definitions of 'region'.[13] The 'formal' definitions focus on physical and geographical characteristics of the marine area, for example distinct feature(s) of a body of water.[14] The 'functional' definitions focus on identifiable management problem or use, such as pollution or fisheries. The 'political' or 'operational' definitions of a region focus existing formal arrangement(s) set up pursuant to agreements of a group of states. Sometimes these definitions may overlap. Regional Fisheries Management Organisations (RFMOs) fit to functional definitions of a region. Whereas, Regional Seas Bodies, such as the one in Mediterranean, fits both formal and functional definitions of a region. It is also important to note that some 'regions' are made up of either areas under national jurisdiction or beyond national jurisdiction, or both. According to Boyle, defining a region is largely "a question of policy: what is the most sensible geographical and political area within which to address the interrelated problems of marine and terrestrial environmental protection?"[15] Therefore, region, regional, and regionalism, for the purposes of this chapter, refer to a geographical/spatial limit within which certain arrangement(s), agreement(s) or mechanism(s) are established for the management of the ocean, at the multilateral level, designed for the implementation of cooperative activities based on common objectives.[16]

2.2 *Regionalism as a framework of cooperation under the LOSC*

This chapter focuses on regional institutions established to address common concerns of the international community in relation to the marine environment. This choice to focus on regional mechanisms and the choice of mechanisms are guided by the LOSC, which contains duties to cooperate through regional frameworks to implement different aspects of the Convention, including marine environmental protection and

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[12] Aldo E Chircop 'Participation in Marine Regionalism: An Appraisal in a Mediterranean Context' (1989) *Ocean Yearbook*, 402, 404.
[13] Boyle (n 9) 26; Chircop (n 12) 404; Lewis Alexander, 'Regional Arrangements in the Oceans', (1977) 71 *American Journal of International Law,* 84; and Boleslaw A Boczeck, 'Global and Regional Approaches to the Protection and Preservation of the Marine Environment' (1984) 16 *Case Western Reserve Journal of International Law,* 39, 54-55.
[14] An example of this could be large marine ecosystems.
[15] Boyle (n 9) 27.
[16] Lewis Alexander, 'New Trends in Marine Regionalism' (1994) 11 *Ocean Yearbook*, 1.

fisheries conservation, and developments after its entry into force.[17] States have general obligations to, combat and prevent marine pollution, and conserve and manage the living resources and biodiversity.[18] The LOSC further prescribes that states shall cooperate through institutions, whether sub-regional or regional, for the conservation of living resources.[19] For the protection and preservation of the marine environment, states have a duty to cooperate on a global or regional, "directly or through competent international organizations" basis to agree upon "international rules, standards and recommended practices…taking into account characteristics regional features".[20]

While the LOSC does not specify a preference for a form of cooperation, there is a strong hint, in relation to fisheries conservation and management efforts, to Regional Fisheries Management Organisations (RFMOs), especially when read together with subsequent developments.[21] The Food and Agricultural Organisation (FAO) Code of Conduct for Responsible Fisheries,[22] as a non-binding instrument provides principles and standards applicable to the conservation, management and development of all fisheries, encourages states concerned in relation to transboundary, straddling and highly migratory fish stocks to cooperate "through the establishment of a bilateral, subregional or regional fisheries organization or arrangement".[23] Moreover, the UNFSA provides that:

> [w]here a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and

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[17] David J Attard, Malgosia Fitzmaurice and Alexandros Ntovas (eds) *The IMLI Treatise on Global Ocean Governance Vol II: UN Specialized Agencies and Global Ocean Governance* (Oxford University Press, 2018).
[18] These obligations are equally applicable to claimant states in relation to their disputed maritime areas; see *South China Sea Arbitration (Award)*, para 927.
[19] In relation to conservation and management of living resources including areas under national jurisdiction and high seas, see Articles 63, 64,118 and 199 of the LOSC.
[20] Article 197 of the LOSC.
[21] James Harrison and Elisa Morgera, Article 63, MN 12, and Article 64, MN10 in Proelss, *UNCLOS: A Commentary* (C.H. Beck, Hart, Nomos, 2017).
[22] FAO, Code of Conduct for Responsible Fisheries (FAO, 1995).
[23] Ibid, Article 7.1.3.

> relevant coastal States *shall give effect to their duty to cooperate* by becoming members of such organisation or participants in such arrangements.[24]

Additionally, the UNFSA also encourages establishment of regional fisheries organisations where they do not already exist.[25]

In relation to the protection and preservation of the marine environment, Article 197 of the LOSC prescribes an obligation to cooperate on a global or regional basis for the protection and preservation of the marine environment.[26] This reference, in Article 197, to regional cooperation reflects the period, before the adoption of the LOSC, in which we saw the establishment of a number of regional regimes to control marine pollution and protect the marine environment.[27] Most notably, in 1974 the United Nations Environment Programme launched the Regional Seas Programme (RSP), which has involved the adoption of action plans and conventions. According to the UNEP website, RSP is "an action-oriented programme that implements region-specific activities, bringing together stakeholders including governments, scientific communities and civil societies".[28] RSPs aims to the protection of the marine environment by coordinating activities at the regional level.[29] The programme consists of three types of programmes across 18 regions. First is those established and administered by UNEP. Second, those that have been established under the auspices of the UNEP, but not administered by it and, finally, independent regimes which RSPs of UNEP cooperate with and as such, are seen as 'partners', namely, Black Sea

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[24] UNFSA, Article 8(3) [emphasis added].
[25] Ibid, Article 8(5).
[26] Part XII of the LOSC concerned with protection and preservation of the marine environment is without prejudice to obligations assumed by states in relation to protection of the marine environment under 'special conventions and agreements' and even acknowledges that states are entitled to conclude special agreements to assume further substantive obligations consistent with the principles of the Convention.[26]
[27] Tim Stephens, Article 197, MN 14, in Proelss, *UNCLOS: A Commentary* (C.H. Beck, Hart, Nomos, 2017).
[28] UNEP, website: https://www.unep.org/explore-topics/oceans-seas/what-we-do/regional-seas-programme
[29] For more on the development of the Regional Seas Programmes see, Kanako Hasegawa and Elizabeth Mrema, 'UN Environment Regional Seas Programmes' in DJ Attard, M Fitzmaurice, and A Ntovas (eds) *The IMLI Treatise on Global Ocean Governance Vol II: UN Specialised Agencies and Global Ocean Governance* (Oxford University Press, 2018) 154-157.

(Bucharest Convention)[30], Arctic Region (Arctic Council)[31], Antarctic Region (CCAMLR)[32], Baltic Sea (Helsinki Convention)[33], and North-East Atlantic (OSPAR Convention).[34]

While the mandates of these two sorts of regional mechanisms are ecologically complementary, in the sense that for instance reduction in pollution may help with fish stocks recovery[35], they are two independent and different sorts of bodies with different mandates and powers.[36] There are importantly some key differences in geographical scope and composition. Regional seas bodies are usually composed of coastal states and the geographical scope cover maritime areas under their jurisdiction. The area of competence of RFMOs on the other hand, are not only areas under national jurisdiction – coastal states mostly have discretion in terms of applying their own rules and regulations – but in areas beyond national jurisdictions and may include states which are regarded as DWFNs and states having a real interest.[37]

2.2.1 Importance of regional approaches in the context of, and for, disputed maritime areas

While it may not be our first instinct to think about regional governance institutions when considering disputed maritime areas, there is value in doing so. Regional frameworks are of particular importance for disputed maritime areas, where bilateral governance and management of marine environment and resources in most cases, if done not all, can be problematic. As explained in Chapter I, disputing states have overlapping sovereign rights and obligations in disputed maritime areas, thus creating several problems. Needless to repeat in detail, it is worth briefly remembering some

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[30] Convention on the protection of the Black Sea against pollution (adopted 21 April 1992, entry into force 15 January 1994) 1764 *UNTS* 4.
[31] Declaration on the establishment of the Arctic Council (Ottawa, Canada 19 September 1996).
[32] Convention on the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 11 March 1982) 1329 *UNTS* 47.
[33] The Convention on the protection of the marine environment of the Baltic Sea Area (adopted 9 April 1992, entered into force 17 January 2000) (hereinafter 'Helsinki Convention').
[34] OSPAR Convention.
[35] Raphael Billé, et al, *Regional Oceans Governance: Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystems Mechanisms Work Better Together* (UNEP Regional Seas Reports and Studies No 197, 2016) 49.
[36] For more on characteristics that differentiate these two regional mechanisms, such as mandates, institutional structures, and geographical scope, see Billé et al (n 35).
[37] UNFSA, Article 8(3) refers to both states fishing on the high seas but also refers to states with a real interest, who may also become members of RFMOs.

of them. For example, in relation to management measures of marine living resources, disputed maritime areas raise the question of '*who'* gets to decide. If one party takes decisions on the management of living resources or conservation of the marine environment unilaterally, the other party would perceive them as one sided – based on, and in furtherance of, self-interest.[38] This would certainly cause further deterioration of the dispute between the states. There may also be circumstances where disputing states are not able to agree on anything, for example, there may be no provisional arrangements in place, leaving the disputed maritime area unregulated or unmanaged creating gap for illegal activities to flourish and threatening maritime security.

The processes in regional frameworks might help address these governance and maritime security problems. By participating in regional governance institutions, disputing states ensure that disputed maritime areas are not 'left behind' due to strong bilateral disagreements about 'who' decides 'how' to manage the marine environment, and 'what' standards should apply etc. Decisions on these question shift to the multilateral level and states do not have to argue about 'who' gets a say in these decisions, they both contribute, but so do the other states of the region, or DWFN for that matter. Such cooperation satisfies the normative conduct sanctioned by the normative framework discussed in this thesis, in particular the principle of cooperation.[39] The decision-making process takes place at the multilateral level, where all interested states, including disputing states, collectively agree on standards and measures, based on scientific evidence presented by experts sitting on specialist committees. As such, regional governance can contribute to the management of disputed maritime areas and its resources, ensuring that standards in disputed maritime areas are not sluggish, policies and measures are coordinated, and harmonious with those at the regional level – producing positive outcomes towards achieving common goals concerning the marine environment.

[38] Problems associated with unilateral decisions have been identified earlier in this thesis, see Chapter IV.
[39] See, Chapter II.

Another of the key advantage of regional cooperation is the possibility of taking ecosystems as an indivisible whole. This approach has great benefits for the protection and preservation of marine environment, shared resources, and biodiversity.[40] Measures agreed and adopted at the regional level, which states will apply in areas either under their jurisdiction and/or beyond, are more likely to be effective in achieving the common goals pursued due to harmonised environmental policies and actions. In doing so, the principle of protection and preservation of the marine environment is given effect alongside the rules in the LOSC.[41]

The question that arises is why should we expect cooperation through regional governance mechanisms to work in the context of disputed maritime areas? There are several interconnected explanations. First, it is observed that common concerns, such as pollution of the marine environment and diminishing fish stocks or biodiversity, have a uniting power. Common concerns have the power to bring states together, who would otherwise pursue 'suboptimal' independent and divergent actions, to cooperate in the governance decisions within a broader multilateral framework, i.e., a regional seas body. The uniting power of shared or common concerns is also reinforced by the legal duty to cooperate on such matters, as addressed in previous section. In the International Relations (IR) literature, this is processes is explained by 'international (institutional) socialisation theory'. According to this theory "sustained interactions within IGOs…socialise states in the international system…leading to interest convergence".[42] This happens as institutions shape member-state behaviour through regular interaction which leads to states taking on new identities and interests, thus leading to 'shared interests' between members.

In this connection, 'epistemic communities' play an important part. Theorising on conditions enabling successful multilateral cooperation on environmental matters, Haas focuses on the power of 'agreement on the problem' by 'epistemic communities'

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[40] There is ample body of research stressing the importance of ecosystem approach for marine environmental protection and biodiversity, for example, see K Sherman et al., 'A Global Movement toward an Ecosystem Approach to Management of Marine Resources' (2005) 300 *Marine Ecology Progress Series* 275.

[41] For discussion of principles and rules, see Chapters, II, III and IV.

[42] David Bearce and Stacy Bondanella 'Intergovernmental Organizations, Socialization, and Member-State Interest Convergence' (2007) 61 *International Organization* 703, 708 and 722-723.

who then influence collaboration on solutions, or how to address the problem.[43] Epistemic community is "a professional group that believes in the same cause and effect relationships, truth tests to assess them, and shares common values" and may come from different scientific disciplines.[44] When there is agreement on common concerns, there is likely to be agreement on the solution, i.e. measures to be adopted, because the issues are highly technical and scientific in nature, requiring the involvement of science and experts, or, as Haas explains 'epistemic communities' – who have more in common with independent scientists and each other, than government ministries they may represent. While the argument of Hass premises upon the regional sea bodies, arguably a similar process occurs in the RFMOs. In both types of regional mechanisms, cooperation is highly technical and scientific. This means that not only foreign ministry officials are involved, but also scientists from governments, as well as independent scientists, and therefore the decision-making process is de-politicised to some extent – although it must be acknowledged that this point runs into limitations in relation to RFMOS, given that they are also concerned with questions of allocation as well as conservation, which are highly political.

Moreover, multilateralism diffuses tensions – bilateral relations between disputing states becomes less head on head when transposed to multilateral level. Multilateralization of the question of '*who*' gets to decide *'what'* management and conservation measures are to be adopted lessens bilateral tensions between disputing states. The process of collective decision-making on 'common concerns' neutralises suspicions between disputing states that would exist otherwise[45] – if states unilaterally decided on fisheries or environmental related measures. Regional governance institutions involve other states of the region, who are not part of the territorial or

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[43] Peter M Hass argues that mobilised 'epistemic community' rallied governments to pursue environmental protection in the Mediterranean, see *Saving the Mediterranean: The politics of international environmental cooperation* (Columbia University Press, 1990), 216-217. Also, on 'epistemic communities' see, Haas, P. 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization*, 1–37.

[44] Hass, *Saving the Mediterranean* (n 43) 55.

[45] The IR literature also offers 'information account' which is a casual mechanism that explains cooperative and conflict reducing effect of international organisations. This account focuses not on the socialisation ability of international institutions but rather on the 'information' that IGOs provide a greater amount of "information about the state of the world, including information about member-states' capabilities, intentions, and so on. With this new information, states simply find their institutional partners to be less threatening than before thus leading to more similar interests" see, Bearce and Bondanella (n 42) 708 and 722-723.

maritime disputes and who have an interest in securing the cooperation of the disputing states on common concerns, and as such, help focus the attention of all states on their common goals. Moreover, by its nature, all states are involved in multilateral decision-making processes, for example, if consensus is required for the adoption of measures. When adopted by such a process, each party has more reason to comply with the measures as they have positively contributed to the decision.[46] Over time, the iterative nature of these multilateral processes may help repair confidence and build trust between all states and importantly disputing parties. In addition, legal arrangements of such multilateral mechanisms may also provide certain guarantees to states regarding their disputes or respective positions, which enable participation and cooperation without much hesitation as to the implications of cooperation for their dispute.

Finally, connected to the last point, the involvement of third parties may help overcome some of the political difficulties, which we may otherwise expect to hamper regional cooperation.[47] Most multilateral processes involve third parties who either facilitate or contribute, in many ways, be it scientific, financial, or organisational, to the achievement of goals or objectives pursued by states via regional mechanisms and settlement of disputes that may arise. Third parties may be international organisations, representatives/executives of a specific branch of an international organisation, and other states of the region. While not an issue of regional ocean governance, there are some broader positive examples of third-party involvement that show how third-party mediation can be instrumental in facilitating agreements between disputing states. One such example is the World Bank's role in negotiation and adoption of Indus Waters Treaty[48] between India and Pakistan. The dispute over the Indus River basin between India and Pakistan dates to their partition in 1947. As bilateral negotiations

[46] Jaquelin Turner, Julia Jabour and Denzil Miller, 'Consensus or Not Consensus: That Is the CCAMLR Question' (2008) 22 *Ocean Yearbook Online*, 117, 155.
[47] This issue is discussed in the IR literature, which provides arguments and support that international organisations (regional or global) actively promote third-party dispute management/resolution for their members, i.e., Megan Shannon, 'Preventing War and Providing the Peace? International Organizations and the Management of Territorial Disputes' (2009) 26 *Conflict Management and Peace Science*, 144, 159.
[48] The Indus Waters Treaty 1960 Between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development (adopted 19 September 1960, entered into force 12 January 1961) 419 *UNTS* 125.

failed repeatedly, the World Bank entered into the picture. The negotiations under the good offices of the World Bank began in 1951 and the Treaty was signed in 1960. Arguably, the final success of the negotiations is attributable to mediation efforts of the World Bank.[49] The literature argues that the positive and active mediatory role played by the World Bank, such as providing proposals to the parties when negotiations reached a stalemate, was crucial to ensuring agreement between parties.[50] The Bank's mediatory role was supported by financial incentives offered to parties for the development of the Indus River basin. The Indus Basin Development Fund[51] helped cover the financial costs of the final agreement based on World Bank's proposal, i.e., division of the rivers.[52] This unique example shows that even in cases involving countries that have strained relations, who see each other as archenemies, third-party mediation can be instrumental in reaching an agreement. In relation the context of disputed maritime areas, third-party involvement may notably diffuse tensions between disputing states and financial incentives may make cooperation appealing.

Resting on these presumptions about why regional institutional frameworks might work, and indeed, prove advantageous for the dispute and the management of disputed maritime areas, the next section focuses on four case studies of different regions to investigate whether regional institutional frameworks may positively contribute to the management of disputed maritime areas.

2.3 *Regional institutions: their selection, disputes, structures, and mandates*

This chapter focuses on selected case studies of regions and regional institutions. A few considerations have informed this selection process. One key consideration, however apparent, is the existence of a disputed maritime area within regions, and within the area of competence of a regional institution in that region. The other consideration is the subject matter covered by the regional frameworks. The choices

[49] Some literature acknowledges the role of the Bank but also attributes agreement to other factors, see Undala Z Alam 'Questioning the Water Wars Rationale: A Case Study of Indus Waters Treaty' (2002) 168 *The Geographical Journal* 341, 346.
[50] Mikiyasu Nakayama 'Successes and failures of International Organisations in Dealing with International Waters' (1997) 13 *International Journal of Water Resources Development* 367, 369-370.
[51] The World Bank initiated the Fund and several states made contributions, such as the UK, Canada, and Australia.
[52] Nakayama (n 50) 370.

are made from two broad sectors: marine environmental protection and fisheries conservation and management. While the main objective of all of the cases discussed below either concern marine environmental protection or conservation and management of living resources, marine scientific research (MSR) performs an important function to those ends. It is also necessary to note that a region with disputed maritime areas may have more than one sectoral regional governance mechanism.[53] For these reasons, this chapter focuses on four regions, namely, the Mediterranean, South-East Asia, the Antarctic, and the Indian Ocean. It should be noted that the Arctic Region was considered for inclusion in this chapter, but it was eventually decided that it falls outside the scope of this chapter and thesis because disputes in that region predominantly concern extended continental shelves, outside the scope of this thesis due to space limitations.

In relation to the South-East Asian Region, this chapter focuses on the East Asian Seas Programme of UNEP RSPs.[54] The Antarctic, a special case for a number of reasons, further addressed below, calls for a few remarks in relation to the regional mechanism that is under focus in this chapter – Convention for the Conservation of Antarctic Marine Living Resources and CAMLR Commission.[55] While the literature sometimes refer to CAMLR Commission as an RFMO, it is important to note that such characterisation is controversial since its mandate goes beyond fisheries.[56] Interesting, but equally controversial, is the listing of CCAMLR in the UNEP Regional Seas Programme website as one of the independent regional sea bodies. Notably, discussions as to whether CCAMLR classifies as an RFMO have arisen within CAMLR Commission meetings. It has been argued, by some contracting parties of CAMLR Commission, that CCAMLR is not an RFMO, as its scope "exceeds by far that of a mere fishing agreement, from which [CCAMLR] is substantially different", but is a

[53] For example, in the Mediterranean, Barcelona Convention deals with environmental protection and General Fisheries Commission for the Mediterranean deals with fisheries.
[54] UNEP, Action Plan for the Protection and Development of the Marine Environment and Coastal Areas of the East Asian Region, UNEP Regional Seas Reports and Studies No. 24 (UNEP, 1983) (Hereinafter 'EAS Action Plan') available online at: https://wedocs.unep.org/bitstream/handle/20.500.11822/22385/Action_plan_Marine_EastAsia.pdf?sequence=1
[55] CCAMLR's parties include 25 States plus the EU.
[56] Raphael Billé, et al (n 35) 33.

component of Antarctic Treaty System.[57] While another, reiterating the purpose of CCAMLR as "conserving Antarctic marine living resources (which include fish) by means of international cooperation", underlined that the term conservation includes rational use, i.e., of fish, and as such, by terms and practice CCAMLR "unquestionably involves regional fishing regulation".[58] There seemed to be broad agreement in 2002 regarding the management role envisaged in the formulation of the CCAMLR, whereby the Commission "agreed that its role as a conservation organisation with responsibility for managing fisheries in the Southern Ocean gives it the attributes of an RFMO within the context of the UN and its subsidiary bodies".[59] Yet again, it was highlighted in a more recent meeting that in terms of its mandate "CCAMLR is a conservation organisation and it is quite distinct from an RFMO".[60] Therefore, this chapter does not characterise CCAMLR as one or the other, but rather treats it as a special regional mechanism that transcends the boundaries of a typical RFMO and a regional sea body. In relation to Mediterranean, this chapter focuses on the Barcelona Convention[61], the senior of UNEP RSPs concerning marine environment[62], and General Fisheries Commission of the Mediterranean.[63] In the Indian Ocean Region, the chapter focuses on Indian Ocean Tuna Commission (IOTC). The regional sea programme of UNEP, namely, the Nairobi Convention falls out of scope of this chapter because it does not fit the selection criteria of cases for this chapter: the existence of dispute and cooperation through the regional mechanism.[64]

The final caveat, worth making at the outset, is that the basis of regional mechanisms discussed in this chapter are binding legal frameworks, except one – the East Asian Seas Programme. Indeed, most of the UNEP RSPs began their journey based on soft-law mechanisms, creating the impetus to move forward with legally binding

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[57] See statements of Chile and Argentina 14th of CAMLR Commission Meeting (1995) para 15.1 and 15.2.
[58] Statement of Australia at the 14th CCAMLR Commission Meeting (1995) para 15.4.
[59] Report of the 21st CAMLR Commission Meeting (2002) para 15.2.
[60] Report of the 31st CCAMLR Commission Meeting (2012) para 9.17.
[61] Convention for the Protection and Development of the Marine Environment and Coastal Region of the Mediterranean Sea (as amended and renamed in 1995) (in force as of 12 February 1978) (hereinafter 'Barcelona Convention').
[62] It was adopted before the entry into force of the LOSC.
[63] Agreement for the Establishment of the General Fisheries Commission of the Mediterranean (adopted in 1949, entered into force on 20 February 1952) (as amended in 1963, 1976, and 1997).
[64] The United Kingdom is not a party to the Nairobi Convention and France is a party, albeit only in relation to Réunion and not in relation to disputed islands such as Mayotte or Tromelin.

mechanisms. For example, cooperation in relation to marine pollution in the Mediterranean Sea started with the Mediterranean Action Plan (MAP)[65] and commitments were formalised through a binding regional agreement: the Barcelona Convention. The Barcelona Convention and its seven Protocols adopted in the framework of the MAP constitute the principal legally binding multilateral environmental agreement in the Mediterranean. Not all instruments adopted under the Barcelona Convention are legally binding, however. For example, as a first step towards fulfilling the obligation under article 16 of Barcelona Convention in relation to cooperation to address liability and compensation for damage resulting from pollution of the marine environment, parties adopted non-binding guidelines.[66] Many other regions have followed the model of Mediterranean, although not all regions have moved towards a legally binding framework, as in the case of the East Asian Sea Programme. Indeed, in some situations, the existence of a disputed maritime area may be a factor in preferring an informal approach.[67] Yet the lack of a legally binding framework does not prevent cooperation or the promotion of common goals. In the context of conservation and management of living resources, effective mechanisms are based on a legally binding framework, i.e., the Convention on Conservation of Antarctic Marine Living Resources (CCAMLR). Yet again, the preferred type of regional cooperation mechanism depends on circumstances of a region. Some regions prefer a purely advisory role for regional fishery bodies, without any management powers.[68]

The following sub-sections of this chapter focus on the identified regions in turn. The aim is to investigate how disputing states cooperate through regional mechanisms,

[65] Mediterranean Action Plan, Report of the Intergovernmental Meeting on the Protection of the Mediterranean, 28 January – 4 February 1975 (UN Doc UNEP/WG.2/5, Annex) available online at: https://wedocs.unep.org/bitstream/handle/20.500.11822/5250/75wg2_5_eng.pdf?sequence=1&isAllowed=y

[66] 'Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area' (Decision IG 17/4), UN Doc UNEP(DEPI)/MED IG.17/10 Annex V, p. 133.

[67] See section 3.2 below for further discussion on this point.

[68] Both legally binding and non-binding regional governance frameworks have associated advantages and challenges – one is not strictly or inherently better than the other.

whether they do so 'successfully'[69], and if so, what are the reasons for that success? By answering these questions, this section addresses whether the presumptions introduced in section 2.2.1 hold true in practice. The structure of the subsections in general follows the same pattern, the subsections briefly introduce the regional institution and considers the experience of cooperation of disputing states through the institution in question.

2.3.1 Mediterranean Region

The Mediterranean Region is home to 21 coastal states: Albania, Algeria, Bosnia-Herzegovina, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria, Tunisia and Turkey (also the EU).[70] The Mediterranean Sea, covering 2.51 million km^2, is a highly diverse marine ecosystem, providing habitats for the Atlantic bluefin tuna's main spawning areas, sea turtles, such as the green and loggerhead turtles that nest along the eastern Mediterranean, and the endangered Mediterranean monk seals which are found around the eastern part of the Mediterranean, including around the coastal areas of Cyprus and the Aegean Sea.[71] The Mediterranean is not only well known for its environment and ecosystems but also for the region's ability to forge cooperative agreements in the protection of the marine environment and management of living resources, despite disagreements and conflicts, at times involving the use of armed force. Some regard the Mediterranean region as a pioneer "in the development of cooperative agreements and the establishment of institutions to pursue common aims, shared by its coastal States".[72]

There are at least two groups of states that are parties to major disputes/conflicts, mostly in the Eastern Mediterranean. The disputes can be categorised into two, those

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[69] 'Success' here is neither used in relation to the general success of the multilateral institution to achieve its objectives nor means or suggests that I expect relations between the disputing states to be unproblematic throughout the years. Rather its use signifies that whether, over the course of the involvement in the multilateral institution and its existence, parties managed to get together and agree on conservation measures including for the disputed maritime areas without major blockages.

[70] These coastal states are all parties to the Barcelona Convention.

[71] UNEP, see UNEP website on the Mediterranean, available online at: https://www.unep.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/regional-seas-programmes/mediterranean?_ga=2.63785007.1648213793.1653988218-1304624719.1653988218

[72] Irini Papanicolopulu, 'The Mediterranean Sea' in Donald Rothwell et al.(eds) *The Oxford Handbook of the Law of the Sea* (OUP, 2015) 616.

that are about disputes over delimitation of maritime zones, which are plentiful in number due to geographical constraint of the Mediterranean basin, and disputes that concerning sovereignty over land. One such example is between Turks, Greeks, and Cypriots whose relations hit probably the lowest point after the military coup d'état executed by the Cyprus National Guard and the Greek military junta, overthrowing the President Makarios of Cyprus, and the landing of the Turkish Army in Kyrenia, Cyprus, five days after the coup, in July 1974 – less than a year before the Intergovernmental Meeting that adopted MAP in Barcelona. The other dispute involves the long-standing Israeli-Palestinian conflict. At the time when the first intergovernmental meeting was convened, none of the Arab coastal states bordering Mediterranean, namely, Algeria, Egypt, Lebanon, Libya, Morocco, Syria and Tunisia recognised the State of Israel, and, Palestine did not and does not participate in the Meeting of the Contracting Parties.[73] In relation to disputed maritime areas, since the beginning of the 1970s, Turkey and Greece were, and still are, in a political deadlock over their respective sovereignty and sovereign rights over the Aegean Sea due to disputes over the delimitation of their maritime zones. Greece submitted the dispute to the ICJ, requesting provisional measures pending the judgment.[74] However, the Court found it lacked jurisdiction on the merits to deal with the case and the dispute remains unresolved.[75] Israel and Lebanon have an unresolved dispute over their maritime areas.[76]

Given that these disputes were ongoing when the process for the inception of the MAP was initiated, a challenging question was hanging over the viability of the MAP process: would the coastal states around the Mediterranean enter into an environmental agreement amidst strong political antagonisms and national feuds, including both maritime and mixed disputes.[77] Not only were these challenges

[73] Today Egypt, Morocco and Tunisia recognise Israel.
[74] *Aegean Sea Continental Shelf Case* (Provisional Measures).
[75] *Aegean Sea Continental Shelf Case* (Judgment), para 109 (the operative part of the Judgment). This case is further discussed in Chapter VI.
[76] News emerged of an agreement between Lebanon and Israel as the author was finalising this thesis. The agreement was a result of indirect negotiations as part of a mediation process facilitated by the US. See, Press Statement by Antony Blinken (US Secretary of State) 27 October 2022, available online at: https://www.state.gov/historic-agreement. For more on agreement, see: C Yiallourides et al, 'Some observations of the Agreement between Lebanon and Israel on the Delimitation of the EEZ' EJIL: Talk!, 26 October 2022, available online at: https://www.ejiltalk.org/Israel-Lebanon.
[77] Tolba (n 4), at p. 38.

overcome, but the resulting Barcelona Convention System[78] is one that is often held up as a model of regional cooperation in the field of marine environmental protection.[79] As a framework agreement, the Barcelona Convention only contains basic principles and general obligations in relation to the protection of the marine environment. Interestingly, this approach resembles and reflects the approach taken in the LOSC. For example, the Barcelona Convention binds parties to "individually or jointly take all appropriate measures…to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment".[80] Parties are also required to "cooperate in the formulation and adoption of protocols, prescribing agreed measures, procedures and standards for the implementation of this Convention" and parties undertake to "cooperate… in the fields of science and technology and to exchange data as well as other scientific information" and "promote research on, access to and transfer of environmentally sound technology..".[81] Today, the Barcelona Convention and seven protocols, making up 'the Barcelona Convention System' elaborate specific obligations, measures and regulations in the sphere of marine environmental protection.[82] Notably, Specially Protected Areas and Biological Diversity Protocol places emphasis on scientific research. The parties are under an obligation to encourage and develop scientific research for the aims of the protocol, including into the sustainable use of specially protected areas and the management of protected species.[83] In this respect, the Specially Protected Areas Regional Activity Centre plays an important role in facilitating exchange of scientific information and coordination of research and monitoring programmes undertaken by the parties.[84]

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[78] Referring to the Barcelona Convention and its seven protocols.
[79] The legal framework of the Barcelona Convention has developed along the lines of, and mirroring evolving principles of global environmental protection, establishing itself as one of the most comprehensive among UNEP RSPs; Billé, et al (n 35) 483.
[80] Article 4(1) of Barcelona Convention.
[81] Ibid, Article 4(5); Article 13(1) and (2).
[82] Since there is not enough scope to cover all protocols, this chapter will briefly touch upon three of them in passing. Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea (adopted 25 January 2002, entered into force 6 August 2004) (hereinafter 'Prevention and Emergency Protocol'); Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (adopted 10 June 1995, entered into force 12 December 1999) (hereinafter 'SPA/BD Protocol'); Protocol on Integrated Coastal Zone Management in the Mediterranean (adopted 21 January 2008, entered into 24 March 2011) (hereinafter 'ICZM Protocol').
[83] Article 20(1) of SPA/BD Protocol.
[84] Ibid, Article 20(3).

The dynamic institutional structure of the Barcelona Convention, which has expanded over the years to match the comprehensive legal framework, provides Mediterranean states with assistance and support for the implementation of the convention and its protocols. There are multiple bodies worth mentioning, such as the Contracting Parties (COP).[85] Importantly, multiple Regional Activity Centres (RACs) provide states with technical assistance, facilitate cooperation between states parties, and support the implementation of the Convention, and in particular, its protocols. Currently, there are seven RACs that provide a range of support to states.[86] Finally, the Compliance Committee, which assists parties regarding compliance with their obligations as well as generally working to promote, monitor, and secure compliance.[87] The Committee's mandate cover "specific situations of actual or potential non-compliance" by parties and may take multiple measures including assisting and requesting the party concerned to develop an action plan to achieve compliance within a certain time frame "with a view to promoting compliance and addressing cases of non-compliance".[88] While this brief overview of the substantive mandate and institutional set-up of the Barcelona Convention System does not do justice to the complex process of marine environmental governance in this region, it sufficiently introduces the Barcelona Convention System for the purposes of this chapter. [89]

A survey of the various reports and documents of the Barcelona Convention System reveals no references to disputed maritime areas nor evidence that disputed maritime areas cause problems for the regional institutions established by the System. It is

[85] Meets every two years. It is the main decision-making body but also reviews parties' implementation of the Convention, see Article 18(2) and 26 of the Barcelona Convention.
[86] Mediterranean Pollution Assessment and Control Programme (MED POL) based in Greece; Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC) based in Malta; Priority Action Programme (PAP/RAC) based in Croatia; Blue Plan (BP/RAC) based in France; Specially Protected Areas (SPA/RAC) based in Tunisia; Sustainable Consumption and Production (SCP/RAC) based in Spain and Information and Communication (INFO/RAC) based in Italy.
[87] Decision IG 17/2: Procedures and mechanisms on compliance under the Barcelona Convention and its Protocols, adopted at COP 15th in Madrid, Spain 15-18 January 2008 (Doc UNEP(DEPI)/MED IG.17/10 Annex V, at p. 21). Amended by Decision IG.20/1, Annex I at COP 17th in Paris, France 8-10 February 2012 (Doc UNEP (DEPI)/MED IG 20/8, Annex II) and Decision IG.21/1 Annex IV at COP 18th in Istanbul, Turkey 3-6 December 2013 (Doc UNEP (DEPI)/MED IG 21/9, Annex II).
[88] Decision IG 17/2, Articles 17 and 32.
[89] It is not feasible for this thesis to include a more comprehensive account of the Barcelona Convention System as the focus is not per se the regional bodies themselves but on their interaction with disputed maritime areas.

remarkable that amid national feuds in the 1970s, negotiations succeeded in committing states to cooperate with each other regarding the marine environment and the continuing success of the mechanism to foster cooperation despite the existence of several significant disputes. It is useful here to consider an example to illustrate the successful cooperation between the disputing states of the Mediterranean through the mechanisms of the Barcelona Convention. This example concerns the work of one of the Regional Centres – Regional Marine Pollution Emergency Response Centre (REMPEC).

REMPEC's mandate involves activities relating to prevention of, preparedness for and responses to marine pollution, in particular the objective of REMPEC is to contribute to preventing and reducing pollution from ships and combatting pollution in cases of emergency.[90] In doing so, REMPEC is accorded an intermediary role by the Prevention and Emergency Protocol, as a communication coordinator between Parties in relation to pollution related activities.[91] A recent oil pollution event in the Eastern Mediterranean illustrates the importance of the coordinator role of REMPEC. On the 23rd of August 2021, a leak occurred from a fuel tank at the Baniyas Thermal Station in Syria that led to the leakage of fuel into the sea.[92] Syrian authorities informed REMPEC and in turn, REMPEC notified neighbouring coastal states including Cyprus and Turkey that their coasts may be at risk – satellite imagery showed the oil slick moving towards the Karpas peninsula (territory not under control of by the Republic of Cyprus), on the northeast coast of Cyprus, and also south east coast of Turkey. REMPEC has taken a coordinating role between Cypriot and Turkish authorities in relation to assessments of risks to Karpas peninsula, discussed preventive measures undertaken by each coastal State and coordinated their efforts to combat pollution.[93] This demonstrates how multilateral institutions/intermediary third parties can enable

[90] Its mission is to assist parties in meeting their obligations under Articles 4(1), 6 and 9 of the Barcelona Convention; the 1976 Emergency Protocol; the 2002 Prevention and Emergency Protocol.
[91] See for example Articles 7, 8 9, 10 and 12 of Prevention and Emergency Protocol, Barcelona Convention.
[92] REMPEC, Incident involving a fuel leakage into the Mediterranean Sea from the Baniyas thermal station, Syria, 10 September 2021, available online at: https://www.rempec.org/en/news-media/rempec-news/incident-involving-a-fuel-leakage-into-the-mediterranean-sea-from-the-baniyas-thermal-station-syria-1
[93] See, ibid, "REMPEC has been in contact with Cyprus and Turkey to assess the situation, ascertain the arrival of oil on the Cypriot island, take stock of the preventive measure undertaken by the individual coastal States, and endeavour coordination of efforts".

and facilitate cooperation between disputing states on an ongoing basis. This example also illustrates the power of common concerns, pollution in this context, in bringing states together and enabling them to look beyond their disputes within a multilateral governance framework.

Is it possible to say that same is true in the case of GFCM which deals with fisheries management in the Mediterranean? The existence of disputed maritime areas does not seem to be a block for GFCM, and neither do they seem to arise during the meetings of the Commission. The author was not able to identify in the documents of the GFCM any disagreements or conflicts arising due to disputed maritime areas.[94] The GFCM have been established under the FAO Constitution Article XIV and is competent to adopt binding decisions. There are 23 contracting parties (including the EU) to the GFCM Agreement. The Commission adopts management measures that apply across the GFCM area of competence – a two-thirds majority of the contracting parties, present and voting are required for the adoption of measures.[95] For example, multiple fisheries restricted areas (FRAs) have been established by the GFCM, one of which is a large deep-water FRA (1, 7300,00 km^2), in which the use of towed dredges and trawl nets are banned in all waters deeper than 1000m, with the aim of protecting deep-sea habitats and resources.[96] The same recommendation also adopted a measure aimed at increasing the selectivity of demersal trawl nets, i.e., implementation at least a 40mm mesh size opening for the whole demersal trawl codend.[97] The GFCM also adopted a management measure applicable in its area of competence requiring its contracting parties to mark fishing gear "in such a way that it can be readily identified, in accordance with national law and with generally accepted standards such as the FAO Voluntary Guidelines on the Marking of Fishing Gear".[98] All such measures apply in the area of competence of GFCM without distinguishing disputed maritime areas or areas under national jurisdiction. While the GFCM is able to formulate various measures under Article 8 of the Agreement, the GFCM does not

[94] The author surveyed all the yearly reports of GFCM sessions available on the GFCM website (reports from the 22nd to 44th session of the Commission is available).
[95] Article 13(1) of GFCM Agreement.
[96] Recommendation GFCM/29/2005/1 (on the management of certain fisheries exploiting demersal and deep-water species and the establishment of a fisheries restricted area below 1000m) para 2.
[97] Ibid, para 1.
[98] Recommendation GFCM/42/2018/11 (on the regional marking of fishing gear) para 1.

set catch quotas or total allowable catch. For fisheries commissions, this issue can be highly political. The experience from the GFCM suggests that the existence of disputed maritime areas is not readily a significant impediment to regional cooperation and disputing states are able to cooperate successfully and to apply common measures to disputed maritime areas.

This begs the question of why cooperation has been successful in these two institutions despite the existence of disputes. What practices are used to ensure conflict between disputing states is lowered to a minimum? In the case of the Barcelona Convention System, there is support for, at least during the adoption phase of the Convention, the presumption that the inclusion of third parties helps facilitate the reaching of agreements. For example, Mostafa Tolba, who served as executive director of UNEP during the establishment of the first regional seas programmes, reflecting on the diplomatic handling of the delegates during the negotiations, explained the methods the UNEP used to keep disagreements to a minimum and prevented conflict between the delegations, leading to successful adoption of the MAP/Barcelona Convention.[99] The director explained that to dismount tensions between delegates, they simply made a note of protest letters submitted by Turkish and Greek delegates and put them aside without taking any action.[100] In relation to Arab and Israeli delegates, an informal agreement kept parties relatively calm – Arab states would not challenge Israel and the Israelis would keep a low profile.[101] Even though these disputes were still outstanding at the time, all of these states became parties to the Mediterranean Action Plan/Barcelona Convention, thereby committing themselves to respect mutual obligations for the protection of the marine environment. It is without a doubt that the strong diplomacy and leadership role undertaken by UNEP had a major role in overcoming disagreements and diffusing tensions between disputing states. Therefore, it is not an understatement to say that procuring agreement on the adoption of the MAP is partly attributable to the UNEP's role as a catalyst and coordinator.[102] However, there were other forces at work that brought all states of the region, including disputing states, together.

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[99] Tolba (n 4), 38-40.
[100] Ibid, 39.
[101] Ibid.
[102] Tolba (n 4), at p. 38.

In both Barcelona Convention and the GFCM iterative nature of the processes of multilateral governance, which involves making technical decisions collectively, over time created a 'chilling effect' on bilateral disputes whereby states agree to disagree and focus on their common concerns. In other words, the focus of states shifts from the dispute to common interests. Within the framework of the Barcelona Convention, disputes do not generally make it to the agenda of meetings of the parties, and when we see reference to disputes by states, they do so to reiterate their desire to put the disputes aside and focus on cooperation. For example, at the 19th COP of the Barcelona Convention, parties adopted a decision on Regional Strategy for Prevention of and Response to Marine Pollution from Ships (2016- 2021).[103] One of the specific objectives identified in this regional strategy is "to strengthen the capacity of individual coastal States to respond efficiently to marine pollution incidents through development of sub-regional operational agreement and contingency plans".[104] Turkey reiterated its support for the south-eastern Mediterranean contingency plan, expressing its preference for no references or mentions to "maritime jurisdiction areas and sovereignty issues" in the respective plan.[105]

Apart from this type of conscious effort to shift focus from disputes to common interests and goals, both the Barcelona Convention and the GFCM textually ensure their parties can focus on their common concerns by the inclusion of 'no prejudice' clauses.[106] The lack of disagreements between the disputing parties might be explained by the 'no prejudice' clause in the GFCM Agreement. Paragraph 2 of Article 3, titled area of application, provides that "[n]othing in this Agreement, nor any act or activity carried out in pursuance of this Agreement, shall constitute recognition of claims or positions of any Contracting Party concerning legal status and extent of waters and zones by any such Contracting Party".[107] Similarly, Article 3(3) of the Barcelona Convention provides that "[n]othing in this Convention and its Protocols shall prejudice the rights

[103] IG. Decision 22/4, Report of the 19th Ordinary Meeting of COP to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols (Athens, Greece 9-12 February 2016) (UN Doc UNEP(DEPI)/MED IG.22/28) at p. 245.
[104] Ibid, p. 285, para 4.22.4.
[105] Report of the 19th Ordinary Meeting of COP (n 101), at p. 11, para 45 and at p. 332 (see footnote).
[106] We shall see that both processes occur in other regions too, more successfully in some than others.
[107] Article 3(2) of GFCM Agreement.

and positions of any State concerning the United Nations Convention on the Law of the Sea of 1982".[108] Turkey as an example, among several others, while a contracting party to Barcelona Convention is not a party to the LOSC.[109] This provision gives assurances to Turkey in terms of its position regarding the maritime disputes in the Aegean Sea, in relation to the breath of the territorial sea and the status of islands, which are subject to its longstanding dispute with Greece (contracting party to both Barcelona Convention and the LOSC). Furthermore, the protocols of the Barcelona Convention also contain no prejudice clauses, including the Prevention and Emergency Protocol[110] and the ICZM Protocol[111] amongst others, but most strikingly in the Protocol on Specially Protected Areas and Biological Diversity. According to paragraphs 2 and 3, article 2 of the Protocol on Specially Protected Areas and Biological Diversity:

> [n]othing in this Protocol nor any act adopted on the basis of this Protocol shall prejudice the rights, the present and future claims or legal views of any State relating to the law of the sea, in particular, the nature and the extent of marine areas, the delimitation of marine areas between States with opposite or adjacent coasts...[112]

> [n]o act or activity undertaken on the basis of this Protocol shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction.[113]

Arguably, these no-prejudice clauses address any concerns that disputing states may have had and places the focus on their mutual obligations. Yet cooperation between disputing states on common concerns is not only promoted passively through these no-prejudice clauses. The protocol actively promotes cooperation between disputing states by prescribing that neighbouring states may establish Specially Protected Areas

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[108] Article 3(3) of Barcelona Convention.
[109] Israel, Syria, and Libya are also parties to Barcelona Convention but not to the LOSC.
[110] Article 3(3) of Prevention and Emergency Protocol.
[111] Article 4(2) of ICZM Protocol.
[112] Article 2(2) of Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean.
[113] Ibid, Article 2(3).

of Mediterranean Importance (SPAMIs)[114] by submitting proposals in relation to "areas where the limits of national sovereignty or jurisdiction have not yet been defined".[115] This means that SPAMIs can be established in areas beyond national jurisdiction and to potentially disputed maritime areas. However, to date there is not a SPAMI established within a disputed area.

2.3.2 East Asian Region

The term "East Asian Seas" according to the Coordinating Body on the Seas of East Asia (COBSEA), refers to the coastal and sea areas surrounding southern China, Viet Nam, Cambodia, Thailand, Malaysia, Singapore, Indonesia, and the Philippines. Within this area, there is a high density of disputed maritime areas. Disputes over maritime areas are also complicated by territorial sovereignty claims to maritime features. There are disputed maritime boundaries between the Philippines and China. China and Viet Nam have a partial boundary agreement in the Gulf of Tonkin established by agreement in 2000[116], however, the area south of this remains disputed. In the Gulf of Thailand, there are numerous disputed maritime areas: between Malaysia, Thailand, Cambodia, and Viet Nam. In the south, Malaysia and Indonesia and Viet Nam have disputed maritime areas. China's nine-dash claim, rejected by the South China Sea Arbitration[117], overlaps with the claims of Malaysia, the Philippines, Indonesia, and Viet Nam. In short, there are ample disagreements between states over their respective maritime zones. Nonetheless, it is still possible to speak of and observe regional cooperation in the East Asian Region. In relation to marine environmental protection, the UNEP with interest from regional states established the East Asian Seas Programme (EAS Programme) with which this section is concerned. In relation to fisheries management, there is no RFMO operating in the region. There is a regional fishery body (RFB), established under the auspices

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[114] The general obligations under this protocol include protection, preservation and management of natural areas and threatened species and their habitats. In doing so, parties are to draw up a list of Specially Protected Areas of Mediterranean Importance (SPAMI) according to Article 8(1) of Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean.

[115] Article 9(2)(c) of Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean.

[116] Agreement between the People's Republic of China and the Socialist Republic of Vietnam on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Beibu Gulf/Bac Bo Gulf (Gulf of Tonkin) (adopted 25 December 2000, entered into force 30 June 2004).

[117] *South China Sea Arbitration (Award),* para 278.

of FAO as an advisory body, namely, Asia-Pacific Fishery Commission (APFIC), previously known as Indo-Pacific Fishery Council/Commission. Although the Commission has a broad mandate to formulate and recommend conservation and management measures, there are several problems that inhibit its effectiveness, which has been pointed out by the literature.[118] The literature suggests that an RFMO could be beneficial for the region.[119] It would not only improve fisheries conservation and management but also assist in diffusing tensions by building trust between states.

The Action Plan for the Protection and Development of the Marine Environment and Coastal Areas of the East Asian Region (the East Asian Seas Action Plan) was adopted, in April 1981 in Manila, at the Intergovernmental Meeting carrying the same name.[120] Unlike the Mediterranean Sea Programme of the UNEP, there is no legally binding regional convention underpinning the EAS Programme. Rather, it functions through the non-binding East Asian Seas Action Plan. At its inception, the EAS Programme covered the marine environment and coastal areas of five states (Indonesia, Malaysia, Philippines, Singapore, and Thailand).[121] Today, membership of the programme stands at nine and includes Cambodia, the People's Republic of China, the Republic of Korea, and Viet Nam. Member countries participate in the programme through a regional intergovernmental mechanism, the Coordinating Body on the Seas of East Asia (COBSEA). COBSEA is the decision-making body for and oversees the implementation of the Action Plan.[122] The objectives in the EAS Action Plan are implemented through the initiation and development of projects and programmes with the approval of member states.

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[118] Nguyen H Thao 'Current Legal Developments Asia-Pacific: Conservation and Management of Marine Resources in the Asia-Pacific: Who is Responsible?' (2004) 19 *The International Journal of Marine and Coastal Law*, 71, 83.

[119] Yen Hoang Tran, 'The South China Sea Arbitral Award: Legal Implications for Fisheries Management and Cooperation in the South China Sea' (2017) 6 *Cambridge International Law Journal* 87, 94; Lingqun Li, 'Cooperation on Fisheries Management in the South China Sea' in Keyuan Zou, Shicun Wu and Qiang Ye (eds), *The 21st Century Maritime Silk Road: Challenges and Opportunities for Asia and Europe* (Routledge 2019) 207.

[120] UNEP, EAS Action Plan (n 54).

[121] Ibid, para 2.

[122] Regional Coordinating Unit for the East Asian Seas Action Plan (EAS/RCU) hosted by Thailand and administered by UNEP is the Secretariat. Secretariat works with National Focal Points to guide parties' implementation efforts.

The EAS Action Plan's first aim was to carry out a scientific assessment of marine and coastal ecosystems in the region and use the data from the scientific assessment to design programmes for the protection and management of the marine and coastal environment.[123] The rest of the Action Plan focuses on the implementation and administrative aspects of the EAS Programme.[124] COBSEA adopted its most recent Strategic Directions (2018-2022)[125] to guide participating countries and the Secretariat in their actions towards the development and protection of the marine environment and coastal areas. The substantive themes of the Strategic Directions are, *inter alia,* land-based marine pollution and governance.[126] In addressing land-based pollution, one of the focus areas is marine litter and microplastics. In relation to marine litter, Strategic Directions proposes the review and revision of the COBSEA Regional Action Plan on Marine Litter (RAP MALI)[127] and its implementation through the development of a regional project or initiative.[128] One of the four main key actions identified by the revised RAP MALI is research activities, including developing and carrying out research on the impact of marine litter on the marine and coastal environment and economy among others as well as undertaking marine litter trajectory modelling in the COBSEA region.[129] Significantly, under the governance theme, Strategic Directions note that EAS Action Plan "identifies COBSEA's role in providing information and guidance on the coordination of coastal and marine environmental activities" and "in exploring the feasibility of development and adoption of suitable legal frameworks".[130] Strategic Directions highlight the importance of governance frameworks to the

[123] UNEP, EAS Action Plan (n 54) at p. 4 and 6, paras 11 and 21.
[124] Ibid, at p. 7-16.
[125] COBSEA Strategic Directions (2018-2022) in Appendix I, as adopted by the Second Extraordinary Intergovernmental Meeting of COBSEA, held in Bangkok, Thailand, 25-26 April 2018 (Doc UNEP/COBSEA IGM EO 2/6), available online at: https://www.unep.org/cobsea/resources/reports/report-2nd-extraordinary-intergovernmental-meeting-cobsea-igm-2eo
[126] Ibid, p. 24, para 19.
[127] COBSEA Regional Action on Marine Litter, adopted at the 19th Intergovernmental Meeting of COBSEA in Cambodia 22-23 January 2008 (Doc UNEP(DEPI)/EAS IG.19/3) Annex IX, at p. 67, available online at: https://www.unep.org/cobsea/resources/reports/report-19th-intergovernmental-meeting-cobsea-igm-19 . The 24th Intergovernmental Meeting of COBESA revised and adopted the Regional Action Plan on Marine Litter in 2019, available online at: https://www.unep.org/cobsea/resources/policy-and-strategy/cobsea-regional-action-plan-marine-litter-2019-rap-mali.
[128] COBSEA Strategic Directions (n 123) para 23.
[129] Revised RAP MALI (n 127) see Appendix 2.
[130] Ibid, para 31.

provision of effective regional policy mechanisms for the coastal and marine environment.

It is notable that the reputation of COBSEA as a regional cooperation mechanism is shadowed by its weaknesses. There are serious criticisms of COBSEA. One common problem identified in the literature is COBSEA's financial challenges.[131] Raising necessary funds have proved difficult over the years and resulted in staff shortages restricting the capacity of COBSEA to operate under its mandate.[132] The general criticism in relation to COBSEA is that it has had a restricted impact.[133] Some of these challenges identified has indeed been acknowledged by the COBSEA in an earlier version of its Strategic Directions (2008-2012).[134]

Despite all the institutional, operational, financial and legitimacy issues faced by the COBSEA, its activities to foster regional cooperation for marine environmental protection is still remarkable in a region fraught with disputes over sovereignty and jurisdiction over maritime areas. While regional cooperation may not look similar to other regions (mostly based on legally binding conventions), the diplomatic culture in the region takes an informal approach to cooperation, in general.[135] This, however, does not mean that cooperation has resulted in failure.[136] It is observable that despite the disputes, a certain degree of regional cooperation is achieved through COBSEA. For example, one of the notable projects of COBSEA, undertaken with the support of UNEP and Global Environmental Facility (GEF), is "Reversing Environmental Trends in the South China Sea and Gulf of Thailand" adopted in 2002 and terminated in

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[131] Jon M Van Dyke, 'Wither the UNEP regional seas programmes?' in HN Scheiber and JH Paik (eds) *Regions Institutions and Law of the Sea: Studies in Ocean Governance* (Brill, 2013) 89-110, 100.
[132] See for example the Report of the 1st Extraordinary Intergovernmental Meeting of COBESA, 19 August 2014, (Doc UNEP/DEPI/COBSEA IG.EO1/7), at p. 4 paras 19-20, available online at: https://www.unep.org/cobsea/resources/reports/report-1st-extraordinary-intergovernmental-meeting-cobsea-igm-1eo.
[133] Vu Hai Dang, *Marine Protected Areas Network in the South China Sea: Charting a Course for Future Cooperation* (Brill, 2014) 122.
[134] COBESA New Strategic Directions (2008-2012), adopted at the 19th Intergovernmental Meeting of COBESA (n 125) Annex 4, at p. 31, 38, paras 10-15.
[135] For example, the idea of "ASEAN Way" is widely discussed in the international relations literature. Regionalism essentially focuses on consultation and dialogue rather than institutionalising cooperation. For more on ASEAN regionalism see, Christopher B Roberts, *ASEAN Regionalism: Cooperation, values and institutionalisation* (Routledge, 2012).
[136] The example of Arctic Council, cooperation has started with a non-legally binding approach and over the years participating states concluded legally binding agreements.

2008,[137] with the adoption of Strategic Action Programme for the South China Sea (SCS SAP).[138] These projects were made possible by relentless mediatory efforts of UNEP and its staff.

The UNEP and the COBSEA staff took on mediatory roles during negotiations for the project coordinated by the COBSEA and GEF "Reversing Environmental Trends in the South China Sea and Gulf of Thailand".[139] In securing the participation of China in the project, the UNEP staff members in COBSEA played a critical role.[140] While the Chinese delegation cooperated in the development phase of the project, contributing to the drafting of the working document, which received endorsement from participating states at the 13th COBSEA Meeting, China failed to send its written endorsement in time for the deadline for submission to GEF Council.[141] From this time onwards, the UNEP staff engaged with China in order to understand the reasons for Chinese disagreement and discussion on further implementation.[142] As Sulan Chen explains, "[t]he main obstacles to the approval of the project stemmed from the political concerns of the Ministry of Foreign Affairs (MFA)…MFA's objection was based on the consideration of traditional foreign policy towards the South China Sea and that China did not wish to internationalize issues related to this regional sea area".[143] Mr. Jihang Jiang, who was a programme officer at the East Asian Seas Programme Regional Coordination Unit (EAS/RCU), the Executive Director of the UNEP and other staff involved in the project had multiple visit to China to meet with Chinese officials. China, then, sent a letter to the Executive Director of UNEP outlining its conditions for further

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[137] Termination Report of the UNEP/GEF South China Sea Project, 25th February 2009, available online at: http://www.unepscs.org/remository/startdown/2228.html

[138] Strategic Action Programme for South China Sea (SCS SAP), 25 August 2008, available online at: http://www.unepscs.org/remository/startdown/1965.html

[139] For more on this project, see discussion below in section 3.

[140] When talking about a certain organisation or institutions role, we often mean the teams and individuals in certain offices and units. Here the general term used refers to EAS/RCU and other individuals that were involved from other institutions such as GEF.

[141] UNEP, Report of the 13th Meeting of the COBSEA, 18-19 November 1998 (UN Doc. UNEP(WATER)/EAS IG.9/3) 19 November 1998, para 44, available online at: https://wedocs.unep.org/bitstream/handle/20.500.11822/29072/CBSA13.pdf?sequence%E2%80%A6; Report of the 14th Meeting of COBSEA, 23-25 November 1999 (UN Doc UNEP(DEC)/EAS IG 10.3) 25 November 1999, Mr Jiang's presentation available at annex IV, available online at: https://wedocs.unep.org/bitstream/handle/20.500.11822/29073/CBSA14.pdf?sequence%E2%80%A6.

[142] Ibid, Annex IV at p.2.

[143] Sulan Chen, 'Environmental cooperation in the South China Sea: Factors, actors, and mechanisms' (2013) 85 *Ocean and Coastal Management*, 131, 135.

negotiations on the project.[144] Consultations continued based on Chinese conditions, finding the compromise on (a) the non-recognition of any territorial claims within South China Sea, (b) not addressing either directly or indirectly issues of sovereignty and (c) no activities were to be undertaken under the project in the disputed areas.[145] Chen recognises important mediatory role played by UNEP staff in COBSEA, such as Mr Jiang and Mr Pernetta[146], including 'hard' and 'soft' negotiation positions that they employed to find a compromise for the implementation of the project.[147] The UNEP's strategy of de-politicisation of environmental protection in the region proved very important for relieving concerns over disputed maritime areas and territories to ensure final endorsement from all states of the region, including China.

However, the successful mediation by the UNEP staff was not the only factor here. Disputing states of the region, and especially China in this case discussed above, secured assurances that participation in regional governance mechanisms would not jeopardise their standing in relation to the dispute. For example, 'no prejudice' clauses, and their variations, are found in project documents and programmes of the EAS Programme.[148] As a final remark, while the current framework of the EAS Programme is non-binding, the process and practice of cooperating on a regular basis over a long period of time, fostering continuous interactions between disputing states, may build up confidence and trust between the parties, facilitating consideration of legally binding commitments in the future. In fact, this is already on COBSEA's agenda. The COBSEA Strategic Directions (2018-2022) identify that there is room for exploring the feasibility of a legally binding convention in the region, as mentioned above.[149] However, it is definitely a challenge since a major participating country expressed, over a decade ago, that time was not ripe for a legally binding framework.[150] One can

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[144] 14th meeting of the COBSEA (n 138) para 22.
[145] See section 3.2 below on further discussion on this.
[146] Senior Programme Officer at the UNEP GEF Coordination Unit.
[147] Chen (n 140) 135.
[148] For example, see, footnote 17 of the UNEP/GEF, South China Sea Project Document, at p.1. Available online at: http://www.unepscs.org/remository/startdown/381.html. Also see South China Sea Strategic Action Programme (SCS SAP) (n 135) footnotes 1 and 2.
[149] COBESA Strategic Directions (n 123) para 31.
[150] As China noted: "it was necessary to enhance regional cooperation among the member countries with the region of East Asian Seas, but currently it is far from mature to discuss a legally binding regional cooperation framework" in 20th Intergovernmental Meeting of COBESA, 2-5 November 2009,

speculate whether or not China and others in the region will change their minds, but it is for sure that the existence of a regional mechanism, even if informal, is likely to produce better outcomes in relation to the marine environment and build trust between disputing states.

2.3.3 Antarctic Region

Antarctica is a remarkable part of the world for many reasons. Legally speaking, Antarctica's significance, for this thesis, is partly about multiple overlapping claims to sovereignty, and unique governance arrangements in place by way of Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)[151] and the Antarctic Treaty (AT)[152], which *inter alia* sets aside, or freezes, sovereignty disputes. Particularly interesting is the dispute between Argentina and the UK over various islands within and just outside the AT areas. The dispute over the islands, then known as Falklands Dependencies, almost made it to the ICJ, about four years before the conclusion of the AT.[153] With the conclusion of the AT, some of the disputed islands, namely, South Shetland Islands and South Orkney Islands, fall within the AT area and as such the dispute over those is essentially frozen. However, disputed sub-Antarctic islands, namely, South Georgia and South Sandwich Islands are outside the AT's scope.[154] These sub-Antarctic islands, however, are located within the area of competence of CCAMLR.

CCAMLR operates in the context of the AT.[155] In fact, the texts of the two treaties are interconnected.[156] While this chapter is not concerned with the AT *per se*, it is important to appreciate the broader context within which CCAMLR and the CAMLR Commission are situated. Thus, some general remarks are worth making. The

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(Doc UNEP/DEPI/COBSEA IGM 20/15) para 35, available online at: https://www.unep.org/cobsea/resources/reports/report-20th-intergovernmental-meeting-cobsea-igm-20 .

[151] CCAMLR (n 56).

[152] The Antarctic Treaty (adopted 01 December 1959, entered into force 23 June 1961) 402 *UNTS* 71.

[153] *Antarctica Cases (United Kingdom v. Argentina and United Kingdom v. Chile)* Order of 16 March 1956, Removal from the list of cases.

[154] The islands are claimed by Argentina and the United Kingdom and are under 'effective control' of the United Kingdom. The 200nm maritime zone around South Georgia and South Sandwich Islands extends south of 60º South into the Antarctic Treaty area.

[155] For more on Antarctic Treaty see Arthur Watts, *International law and the Antarctic treaty system* (Cambridge University Press, 1992).

[156] See below for further discussion of this point.

Antarctic region houses two distinct approaches to disputed areas. Within the areas covered by AT, disputes over sovereignty, sovereign rights and jurisdiction are frozen, but at the same time, CCAMLR pursues management of living resources within its area of competence (there are areas of overlap with AT area). Briefly, Article 4 of the AT freezes territorial sovereignty claims to, and disputes over, Antarctica.[157] The first preambular paragraph of the AT recognise that Antarctica "shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord".[158] In relation to Antarctic territorial claims and the AT, Erik Molenaar makes three points. First, "state parties have opted for an agreement to disagree on Antarctic territorial claims"[159] pursuant to Articles IV and VI of the AT.[160] Second, "as a consequence of the disputed status of Antarctica, claims to sovereignty, sovereign rights and jurisdiction over waters adjacent to Antarctica, as well as their exercise, are controversial".[161] Third, the AT applies to the area south of 60º South latitude, and as such, "a number of sub-Antarctic islands fall beyond the Treaty's scope".[162] Due to the nature of territorial sovereignty over Antarctica, claimant states tend to exercise jurisdiction based on the nationality principle in relation to maritime areas off Antarctica.[163] The situation is different in relation to maritime areas off sub-Antarctic islands. The scope of coastal state jurisdiction over marine living resources is not touched upon in the CCAMLR but in the statement made by the Chairman in the

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[157] Antarctic Treaty, Article 4(2) (This provision is replicated in Article 4(2) of CCAMLR).
[158] First preambular paragraph of the Antarctic Treaty.
[159] Erik J Molenaar, 'CCAMLR and Southern Ocean Fisheries' (2001) 16 *International Journal of Marine and Coastal Law* 465, 477.
[160] Article IV reads as:
1. Nothing contained in the present Treaty shall be interpreted as:
(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting, or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.
Article VI reads as:
The provisions of the present Treaty shall apply to the area south of 60º South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.
[161] Molenaar (n 156) 477.
[162] Ibid, 478.
[163] Molenaar (n 156) 477.

Final Act of the Conference.[164] Before discussing the relevance of the Chairman's Statement, for disputed maritime areas of some sub-Antarctic islands, let us briefly consider the mandate and operation of the CAMLR Commission within the legal framework of CCAMLR.

The objective of CCAMLR is "the conservation of Antarctic marine living resources".[165] The term 'conservation' includes "rational use".[166] The principles of conservation are not named, but rather described in detail, in paragraph 3 of article 2 of CCAMLR. The descriptions, when read together, embody principles of multi-species management and the ecosystem approach.[167] The CAMLR Commission's ecosystem-based conservation and management approach to marine living resources is pointed as a model for other RFMOs and regional bodies concerned with these issues.[168] It is argued that CCAMLR stands out in regional ocean governance because it is able to implement broader environmental protection principles in the Convention Areas "as opposed to pursuing the single-species management model".[169] The ecosystem approach employed by the Commission to manage the harvesting of marine living resources go beyond monitoring the effects of fishing on target species to monitor dependent and associated species for potential impacts.[170] What is more, the Commission has established a number of Marine Protected Areas (MPAs)[171] giving effect to the objective of conservation pursuant to authority granted by the CCAMLR

[164] Statement made by the Chairman in the Final Act of Conference on 19 May 1980, p.112, available online at: https://documents.ats.aq/keydocs/vol_1/vol1_11_CCAMLR_Final_Act_e.pdf
[165] Article 2 of CCAMLR.
[166] Article 2(1) and (2) of CCAMLR.
[167] Molenaar (n 156) 467.
[168] Robin Warner, 'Australian and Antarctic Perspective' in DJ Attard, D Ong, and D Kritsiotis (eds) *The IMLI Treatise on Global Ocean Governance Vol I: UN and Global Ocean Governance* (Oxford University Press, 2018) 321.
[169] Seth T Sykora-Bodie and Tiffany H Morrison, 'Drivers of Consensus-Based Decision-Making in International Environmental Regimes: Lessons from the Southern Ocean' (2019) 29 *Aquatic Conservation: Marine and Freshwater Ecosystems* 2147, 2150.
[170] Article 2(3)(c) of CCAMLR.
[171] CCAMLR Conservation Measure 91-03 (2009) establishes the first high seas MPA, The South Orkney Islands Southern Shelf MPA which prohibits all types of fishing in the MPA, with the exception of 'scientific fishing research activities agreed by the Commission'. This conservation measure also prohibits discharging and dumping of any waste by any fishing vessels. Ross Sea MPA established by CCAMLR Conservation Measure 91-05 (2016) is made up of three different zones, namely General Protection Zone, Special Research Zone, and Krill Research Zone, designed to achieve specific protection and scientific objectives while allowing some fishing to occur within the MPA.

for the "opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation, including special areas for protection and scientific study".[172]

Article 8 of CCAMLR establishes, and assign functions to, the CAMLR Commission to give effect to the objectives and principles of CCAMLR. The CAMLR Commission is given powers to adopt conservation measures, including, but not limited to, Total Allowable Catch (TAC) for any species that may be harvested in the area, designation of closed and open seasons for harvesting and regulation of the effort employed and methods of harvesting.[173] The CAMLR Commission established the Scientific Committee with a mandate to provide the Commission with the best available scientific information on harvesting levels and other management issues.[174] CCAMLR, in turn, imposes the obligation on the CAMLR Commission to take full account of the recommendations and advice of the Scientific Committee in making decisions on conservation measures.[175] The CAMLR Commission adopts conservation measures by consensus and the measures become binding on all members of the Commission 180 days after adoption, unless members opt out, as provided for in the CCAMLR.[176] Conservation measures apply both within national and beyond national jurisdictions, with some exceptions.[177] The CAMLR Commission also established a Standing Committee on Implementation and Compliance (SCIC) to provide it with information, advice and recommendations on monitoring and compliance related matters along with other functions.[178] Currently, the CAMLR Commission has 26 Members, including the European Union, and 10 Acceding States. The Contracting Parties of the Convention who participated in the Conference when it was adopted automatically became Members of the CAMLR Commission.[179] Acceding States neither take part in the decision-making process of the CAMLR Commission, nor contribute to the budget

[172] Article 9(2)(g) of CCAMLR.
[173] Ibid, Article 9(2).
[174] In doing so, Scientific Committee collects data on fisheries monitoring, scientific observers on fishing vessels and ecosystem monitoring and other programmes.
[175] Article 9(4) of CCAMLR.
[176] Ibid, Article 9(6).
[177] See the Chairman's Statement made upon the adoption of the CCAMLR (n 161). The Chairman's statement provides for the application of 'national' measures in the area of competence of CCAMLR in relation to maritime areas off some sub-Antarctic islands.
[178] Article 1 of 'SCIC Terms of Reference and Organisation of Work', based on the Commission's decision as adopted at CCAMLR-XXI (paragraph 5.16 and Annex 5, Appendix VII).
[179] Article 6(2)(a) of CCAMLR.

unless they participate “in research or harvesting activities in relation to the marine living resources to which the Convention applies”, thus becoming Members of the CAMLR Commission.[180] Lastly, the issue of jurisdiction in maritime areas within CCAMLR is quite complex and is connected with the special status of the Antarctic territory.

The CCAMLR does not touch upon the scope or limits of coastal state jurisdiction within its area of competence, save for paragraph 2, of article 4. It provides that:

> 2. Nothing in this Convention and no acts or activities taking place while the present Convention is in force shall:
> (a) constitute a basis for asserting, supporting, or denying a claim to territorial sovereignty in the Antarctic Treaty area or create any rights of sovereignty in the Antarctic Treaty area;
> (b) be interpreted as a renunciation or diminution by any Contracting Party of, or as prejudicing, any right or claim or basis of claim to exercise coastal state jurisdiction under international law within the area to which this Convention applies;
> (c) be interpreted as prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any such right, claim or basis of claim.[181]

Drafted with the intention of creating, what is termed as, “constructive ambiguity”, the Article 4(2) enables dual interpretation, or ‘bifocal’ interpretation/approach, whereby catering to both claimants and non-claimants to Antarctica.[182] As such, the common view is that “the provision can be interpreted either confirming the right to exercise coastal state jurisdiction throughout the CCAMLR Convention Area or as limiting this right to sub-Antarctic islands north of 60^{o} South”.[183] In other words, Antarctic claimant states would point to Article 4(2)(b) to argue that any rights they have remain protected

[180] Ibid, Article 6(2)(b).
[181] Article 4(2) of CCAMLR.
[182] Matthew Howard, ‘The Convention on the Conservation of Antarctic Marine Living Resources: A Five-Year Review’ (1989) 38 *The International and Comparative Law Quarterly* 104, 106-107.
[183] Molenaar (n 156) 479; Howard (n 179) 107.

(i.e., right to exercise coastal state jurisdiction) while Antarctic non-claimants would argue that the article only applies to undisputed claims north of 60° South latitude because Article VI of AT, which parties to CCAMLR are bound by the virtue of Article 4(1), protect the freedom of high seas south of 60° South latitude.[184] In practice, we have not seen Antarctic claimant states following strict enforcement of coastal state jurisdiction. Though, even if they did, it would not be problematic because Article IV of AT assures both the flag state and the claimant state that such actions are without prejudice to claims to sovereignty. In relation to the maritime areas off sub-Antarctic islands, Article 4 does not give sufficient clarity. The inclusion of the Chairman's statement in the Final Act of the Conference is particularly important to understand the status of coastal state jurisdiction north of 60° South latitude – in relation to the disputed maritime areas off sub-Antarctic islands.[185]

The statement of the Chairman concerns "the application of [the CCAMLR] to the waters adjacent to Kerguelen and Crozet over which France has jurisdiction and to waters adjacent to other islands within the area to which this Convention applies over which the existence of state sovereignty is recognised by all Contracting Parties".[186] In short, the Chairman's statement acknowledges that France has a wide margin of discretion in adopting and enforcing conservation measures for its maritime zones off Kreguelen and Crozet Islands.[187] The Statement also acknowledges that "these understandings… also apply to waters adjacent to the islands within the area to which this Convention applies over which the existence of State sovereignty is recognised by all contracting parties." [188] The statement recognises that no objection was made. Although this statement is not formally attached or binding under the Convention, parties have respected it so far. In accordance with this statement, all Contracting Parties respect that France, Australia, and South Africa may exercise their sovereign

[184] Howard (n 179) 107; Molenaar (n 156) 479.
[185] Statement made by the Chairman (n 161).
[186] Ibid.
[187] Statement made by the Chairman (n 161) paras 1-4. The Statement acknowledges that France's conservation measures adopted prior to entry into force of the CCAMLR would remain in force. France has the right to exclude these maritime zones from the scope of application of conservation measures adopted by the CAMLR Commission. Also, adopt its own measures, which may be stricter; and enforce its conservation measures without having the need to implement the system of observation and inspection under Article 24 of CCAMLR.
[188] Ibid, para 5.

rights in conformity with the Chairman's Statement as states with jurisdiction or control over territories. For instance, France and South Africa are known to make reservations to conservation measures for their maritime areas adjacent to Kerguelen and Crozet (France) and Prince Edward Islands (South Africa).[189] However, the right of the UK to do so, based on the Chairman's Statement, is heavily rejected by Argentina in relation to the disputed maritime areas off the coasts of South Georgia and South Sandwich Islands.[190]

According to Argentina, the phrase "over which the existence of state sovereignty is *recognised* by *all contracting parties*" must be given proper weight, which must mean that the UK cannot exercise jurisdiction based on Chairman's statement as not *all* contracting parties recognise the UK sovereignty over the islands.[191] The UK, of course, disagrees with this interpretation. The phrase "was carefully formulated…[i]ts sole purpose was to cover the islands which Parties accept are subject to the sovereignty of some state, even though there may be a dispute as to which. It is the recognition of the existence of state sovereignty which is referred to, not the recognition of the sovereignty of a particular state."[192] The UK has "no doubt that South Georgia and the South Sandwich Islands is sovereign territory, nor that the UK exercises sovereignty over it *de facto* and, the UK of course believes, *de jure*".[193] Notably, the debate surrounding the application of the Chairman's statement continues to occupy the CAMLR Commission, and not only in the context of disputed maritime areas.[194] Chile kick-started the discussion regarding the need for greater harmonisation of CCAMLR conservation measures within the Convention Area, arguing that states should not invoke the Statement to impose national measures for

[189] See exceptions for these islands made in the current Schedule of Conservation Measures in Force 2021/2022 (adopted by the Commission at the 40th Meeting 18-29 October 2021), p. xv-xviii. Available online at CCAMLR website: https://www.ccamlr.org/en/system/files/e-schedule2021-22.pdf
[190] See Argentina's position in the 15th Commission Meeting (1996) (Doc CCAMLR-XV, p. 81-83, para 13.1-13.13).
[191] Ibid [emphasis added].
[192] See the UK's position in the 15th Commission Meeting (1996) (Doc CCAMLR-XV, p. 84 para 13.16).
[193] Ibid.
[194] See the discussion during the 14th Commission Meeting (1995) where Chile, Argentina and Brazil argued for the need to prevent fragmentation of measures in the Convention Area, whereas Australia, France, and UK refused that exercise of coastal state jurisdiction is inconsistent with the Convention, rather it is useful to ensure compliance with conservation measures (Doc CCAMLR-XIV, p. 68-73, paras 15.1-15.6).

the sake of attaining uniformity of measures.[195] In sum, the dispute over South Georgia and South Sandwich Islands are not frozen like those over Antarctica, as they fall outside of the AT Area, and while the Chairman's Statement recognises that states can exercises coastal state jurisdiction in their maritime areas off Sub-Antarctic islands, the problem is there is a sovereignty dispute between the UK and Argentina, who hold divergent views in relation to the Chairman's statement. How does this unresolved bilateral dispute over territory and maritime zones play out in practice? Does it obscure cooperation, or are states able to cooperate through CAMLR Commission over their common concerns? If the answer is yes, then, what are the possible explanations for this 'successful' cooperation between the UK and Argentina despite the dispute?

During the earlier years of the CAMLR Commission the dispute did not seem to get in the way of cooperation – it did not even make it to the discussions during the meetings (at least in the reports of the meetings). However, the disagreements over the dispute surfaced in the late 1980s in the CAMLR Commission meetings. The reports of the meetings show the Argentine delegation often making a statement regarding its non-recognition of the UK sovereignty over the islands and jurisdiction over maritime areas claimed thereof. Such statements, then, are rejected by the UK delegation. In a survey of all CAMLR Commission Meetings, statements concerning the sovereignty dispute between Argentina and the UK are found in 21 out of 40 CAMLR Commission Meetings Reports.[196] The first exchange between Argentine-UK delegations occurred in the eighth Commission Meeting in 1989.[197] Thereafter, starting with the 15th Commission Meeting, the sovereignty statements became an annual occurrence until, and including, the 34th Commission Meeting.

As an example of such statements made by the disputing parties, let us consider the 17th Commission Meeting. During discussions concerning operation of the scheme of

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[195] Chilean paper submitted at the 18th Commission Meeting (1999) entitled 'Consideration of the Implementation of the Objective of the Convention, 3 November 1999 (Doc CCAMLR-XVIII/BG/50 Rev.1).

[196] Commission Meetings are available online at CCAMLR website: https://www.ccamlr.org/en/meetings/26

[197] Letter to the executive secretary of CCAMLR concerning the rights of Argentina to Sovereignty and jurisdiction over the Malvinas (Doc CCAMLR-VIII/BG/25). Letter submitted at the 8th Commission Meeting (1989) 6-17 November 1989 (Doc CCAMLR-VIII, p.7).

international scientific observation, Argentina expressed the view that imposition of a UK designated or approved scientific observer on board of vessels fishing in subarea 48.3 is a violation of the CCAMLR.[198] This is because Argentina opposes the view that UK is the coastal state in the subarea, since the UK sovereignty over the islands are not 'recognised by all contracting parties' in accordance with the Chairman's 1980 statement. The UK reiterated that the deployment of scientific observers on board of vessels "was part of its wider scheme to ensure the effective management of fish stocks in the waters of South Georgia, in line with CCAMLR objectives".[199] The UK considers, in line with the understandings of paragraphs 4 and 5 of the 1980 Chairman's Statement, it has the right to decide on the manner of implementation of the scheme in the maritime areas appertaining to South Georgia and South Sandwich Islands.[200]

On another occasion, during the 26th Meeting, Argentina expressed that all UK actions based in or operating out of the disputed islands are invalid, including port inspections and imposition of fishing licences to other Member vessels.[201] About four years earlier, Argentina protested to the use of UK policing on the high seas departing from the disputed islands in the pursuit an apprehension of a vessel engaged in IUU fishing in the CCAMLR Area.[202] The UK's firm position on the matter is that the right of the Government of Falkland Islands to operate a shipping register for UK-flagged vessels and the port inspections undertaken by respective authorities on the islands of Falkland, South Georgia and South Sandwich are obligations of the UK, conducted pursuant to the CCAMLR conservation measures and reported to the Commission.[203] It is important to note that while such statements were made, such expressions of disagreement did not hinder cooperation on decision-making regarding conservation measures. Over the years, various conservation measures have been agreed upon

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[198] Statements of the Argentine delegation at the 17th Commission Meeting (1998) during the meeting of the Standing Committee on Observation and Inspection 28- 30 October (Doc CCAMLR-XVII, Annex V, p. 15, para 4.13).
[199] Ibid, para 4.15.
[200] Ibid.
[201] Argentina's Statements during the 26th Commission Meeting (2007) 22 October – 2 November 2007 (Doc CCAMLR-XXVI, p. 97, para 20.16).
[202] Argentina's Statements during the 22nd Commission Meeting (2003) 27 October – 7 November 2003 (Doc CCAMLR-XXII, p. 48, para 8.65).
[203] UK Statements during the 26th Commission Meeting (n 198), para 20.17.

by the CAMLR Commission, based on consensus, covering CCAMLR area of competence, including disputed maritime areas. For example, in 1995 the Commission adopted a by-catch limits for five species applicable in sub-area 48.3 (maritime area off South Georgia), which is still applicable to date.[204]

More recently, the improvements in cooperative attitudes of Argentina and the UK are documented in the CAMLR Commission's reports. At the 35th Commission Meeting, Argentina and the UK made statements announcing the "constructive cooperation" between the UK, Argentina, and other observers, to avoid sensitive issues surrounding the sovereignty over South Georgia and South Sandwich Islands during the meetings.[205] Essentially, everyone agreed not to bring up the disputed Islands during the meetings of CAMLR Commission. During the 37th Commission Meeting, Argentina again made a statement reserving its sovereignty over South Georgia and South Sandwich Islands and maritime areas appertaining thereof.[206] The UK delegation expressed their regret that a third party had provoked the sensitive issue and thanked Argentina for their collaboration on other matters during the meeting.[207] In the reports of the 38th and 39th Commission Meetings, the sovereignty dispute does not make an appearance. During the 40th Commission Meeting in 2021, the sovereignty dispute resurfaces as the Commission failed to reach a consensus on the catch limit for Patagonian toothfish fishery in sub-Area 48.3, which includes disputed islands and their maritime areas. As a result, the UK delegation stated, "the UK will consider its next steps to protect its interests in Subarea 48.3, consistent with the CAMLR Convention and in accordance with its rights and responsibilities under the Convention and relevant international law".[208] In response, Argentina restated its well-known

[204] Conservation Measure 33-01 (1995), see the list of conservation measures in force on CCAMLR website: https://www.ccamlr.org/en/system/files/e-schedule2021-22.pdf .
[205] Argentina and UK statements at the 35th Commission Meeting (2016) 17- 28 October 2016, (Doc CCAMLR-XXXV, p. 70-71, paras 12.5-12.6).
[206] Argentina's statements at the 37th Commission Meeting (2018) 22 October – 2 November 2018 (Doc CCAMLR- XXXVII, p. 50, para 12.3)
[207] Ibid, para 12.4.
[208] The UK expressed its disappointment with Russia's blocking of consensus and asked all members to consider how they might assist in resolving the impasse that harms interests of all members. (Doc CCAMLR-40, p. 11-13, para 6.22).

position to the Commission, pointing that it only recognises measures adopted within the multilateral system of the Convention in the subject matter areas.[209]

These sovereignty exchanges between UK and Argentina and their impacts on cooperation through the institutional framework may be interpreted in different ways. Undoubtedly, it is true that these exchanges consume "time and energy that could otherwise be used much more productively".[210] However. It is possible to consider them in a more positive light – such statements enable, or rather, facilitate continued cooperation of the UK and Argentina by way of reserving their claimed rights and position in relation to the dispute. Indeed, from the beginning both states made these statements to remind the other that cooperating through the regional framework does not mean that they are changing their respective positions, this is more so for Argentina. They are statements arising from legal and political considerations given that the UK exercises effective control over the disputed territories, Argentina sees the need to reiterate that its position remains unchanged, as existence of a dispute is significant for the purposes of international law.[211] In a way, one may go far as to say, these statements mirror the purpose served by Article IV of AT, meaning that such statements are an illustration of their 'agreement to disagree' and participate in the regional governance framework in pursuing and working towards common goals, without prejudice to their claims.

Another explanation for the 'success' of cooperation between the UK and Argentina through the CAMLR Commission is science, and science-based technical decision-making. The CCAMLR experience shows that transparency and credibility of science-based decision-making reinforces the feelings of unity and solidarity of states who acknowledge that decisions aim to achieve common interest and goals – rather than serving specific state interests. The decision-making process whereby all interested parties, including disputing states, collectively agree on standards and measures,

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[209] Essentially, this was a response that Argentina considers any 'unilateral' measures taken by what Argentina considers 'illegitimate authorities' in those territories and maritime zones as illegal and invalid. Therefore, exercise of coastal state jurisdiction by UK in maritime zones of South Georgia and South Sandwich Islands (which are part of the Convention Area in question) would be controversial. (Doc CCAMLR-40, p.13, para 6.23).

[210] Molenaar (n 156) 478.

[211] Though admittedly it is unlikely that any formal dispute settlement process will being in the near future.

based on scientific evidence presented by exerts sitting on specialist committees, neutralises suspicions and geopolitics. While Argentina disputes UK sovereignty over the South Georgia and South Sandwich Islands, Argentina has repeated on many occasions that it has no objection to the application of conservation measures adopted by the Commission in the maritime zones of the disputed islands.[212] We also see that the UK does not often invoke the Chairman's Statement to apply different measures in the maritime areas of the disputed islands.[213] This does not come as a surprise as the measures are adopted by the CAMLR Commission are a product of consensus– so they both positively contribute to the decision-making – meaning it matters little 'who' is in control of the maritime area or the territory because both of them, and all the other parties, contribute to the decision on measures.[214] In this way collective decision making improves implementation of measures adopted.

The announcement of the 'constructive cooperation' between the UK and Argentina, supporting the presumption made earlier in this chapter, is an illustration of the positively impacted trust and confidence between the two states from years of involvement in regional governance, making decisions based on consensus and science for the achievement of a common goal. The iterative nature of the regional governance brought and kept these two states on the same table, making them focus beyond their dispute. This is not to say that trust and confidence between these two states were built up over night by simply being parties to the CCAMLR, rather we must acknowledge the incremental nature of this process. The first sovereignty statement was made in 1989 and the constructive cooperation was announced in 2016: it took nearly 30 years. Nevertheless, parties found a way to continue working in cooperation through CCAMLR. It took different forms over the years i.e., sovereignty statements and the constructive cooperation. In addition to some of these possible explanations regarding to the 'success' of cooperation within the CAMLR Commission, there are several others, which more of a legal nature, that may also explain what we see in practice.

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[212] Argentina's Statements during the 26th Commission Meeting (2007) 22 October – 2 November 2007 (Doc CCAMLR-XXVI, p. 97, para 20.16).
[213] See for example the Statement of UK delegation 17th Commission Meeting (n 195) para 4.15; Molenaar (n 156) 480.
[214] Turner, Jabour and Miller (n 46) 155.

Perhaps, one of the most significant being the inter-relationship between the AT and CCAMLR. Although CCAMLR is an independent multilateral agreement, CCAMLR is intrinsically linked to AT. First, Antarctic Treaty Consultative Parties (ATCP) convened the Conference on the Conservation of Antarctic Marine Living Resources, which resulted in the negotiation of the CCAMLR, due to rising threats to Antarctic marine ecosystems. Second, the two legal texts are connected. CCAMLR contain provisions that commit its Contracting Parties to essential parts of the AT, such as Article 4, which deals with the legal status of territorial claims.[215] Other provisions linking the two international legal texts are Articles 3 and 5 of CCAMLR. These provisions of CCAMLR bind Contracting Parties to a range of obligations found in the AT.[216] Additionally, CCAMLR Contracting Parties must observe any conservation measures for the protection of the Antarctic environment adopted by ATCP.[217] The fact that CCAMLR is a part of a greater puzzle within the context of Antarctic Treaty and Southern Ocean governance, arguably create 'a chilling effect' for the dispute between Argentina and the UK. Both countries have assumed significant international legal obligations under the Antarctic Treaty and CCAMLR, including ensuring the region's peace and stability amongst other aims, such as, the protection and preservation of marine ecosystems and the environment. Therefore, their cooperative behaviour may be an attribute of the normative character of this overall multilateral regional governance framework. Another point to note is that the maritime zones generated by South Georgia and South Sandwich Islands are in the CCAMLR Area, partly extending into the AT Area[218] and as such, effectively involve and concern the entire international community due to the multilateral nature of these treaties.[219] In other words, the disputed maritime areas of South Georgia and South Sandwich Islands are part of a multilateral governance

[215] Article 4(1) of the CCAMLR binds its Contracting Parties to Articles 4 and 6 of the AT in their relations with each other. Moreover, Article 4(2) of CCAMLR reflects and incorporates Article 4(1) of AT, which safeguards all parties' positions regarding claims to territorial sovereignty in Antarctica.
[216] For example, under Article 3 of CCAMLR Contracting Parties agree not to engage in activities in the AT Area which are contrary to the principles and purposes of that Treaty and that the obligations in Articles 1 and 5 of the AT, binds CCAMLR Contracting Parties.
[217] Article 5(2) of CCAMLR.
[218] The 200-nm zone around the islands extends into 60º South, Antarctic Treaty Area.
[219] This is implicit in the fact that any state can accede to the Antarctic Treaty pursuant to Article 13, and Article 29 of CCAMLR also provide that accession is open to "any State interested in research or harvesting activities".

regime and, despite the bilateral nature of the dispute over these territories and appertaining maritime zones between Argentina and UK.

Finally, yet importantly, CCAMLR includes a 'no prejudice' clause – Article 4(2) of CCAMLR – which was discussed in relation to the exercise of coastal state rights above.[220] This article provides the necessary assurance to both the UK and Argentina that the status of the disputed sub-Antarctic islands, and their claims to sovereignty, sovereign rights and jurisdiction over their maritime zones would not be affected.[221] Arguably, this is one of the reasons that make continued and 'successful' participation and cooperation of the UK and Argentina in CAMLR Commission possible. The neutrality of CCAMLR enable parties to take a normative stance in relation to the governance of their disputed maritime areas – leaving the dispute aside to focus on the conservation and management of living resources and biodiversity.

In sum, it is true that this chapter interprets the cooperation in this region as a 'success' but does not claim that it is or was perfect, at any point. There have been times that the dispute was an obstacle, but not a complete impediment to cooperation between the UK and Argentina.

2.3.4 Indian Ocean Region

The Indian Ocean borders the African, Asian, and Oceanian continents and there are a number of areas that form sub-regions.[222] The coastal states of the Indian Ocean are numerous, most of which are continental states but also a number of island nations and archipelagic states. They differ on many parameters.[223] There are two regional governance institutions that are relevant, only one of which is of interest. The UNEP RSP, as explained above, is not of interest for the purposes of this chapter and

[220] See footnote 179 above and corresponding text.
[221] Molenaar (n 156) 479.
[222] Such as the Persian Gulf, the Red Sea, Gulf of Eden, Arabian Sea, South Asian Seas etc.
[223] For more on the Indian Ocean Region, see Alex Oude Elferink, 'The Indian Ocean and the Law of the Sea: A Work in Progress' in D Rothwell et al (eds) *The Oxford Handbook of the Law of the Sea* (OUP, 2015) 701-702.

therefore will not be discussed. As such, this section will focus on Indian Ocean Tuna Commission (IOTC).[224]

While the UK was preparing for the independence of then Crown Colony of Mauritius, the Chagos Archipelago was split from Mauritius[225], forming part of the British Indian Ocean Territory (BIOT).[226] The dispute concerning sovereignty over Chagos between Mauritius and the UK remains unresolved today.[227] Much less high profile compared to the UK/Mauritius sovereignty dispute over Chagos, there are other disputes over islands and their surrounding maritime zones within IOTC Area between France and Comoros over Mayotte Island, and France and Mauritius over Tromelin Island.[228] Despite these disputes, the UK, France, Mauritius and Comoros became parties to the agreement establishing the Indian Ocean Tuna Commission (IOTC) concluded in November 1993, under article 14 of the FAO Constitution.[229] However, sovereignty disputes were in fact a problem during the negotiations of the draft agreement establishing the IOTC. As noted at the session of the FAO Council the "problem was of a political nature and arose out of the proposed participation in the new Commission of two Member States of the EEC in respect of their overseas territories because the legal status of some of these territories was still a subject of dispute".[230] Simply, the point of controversy concerned the eligibility criteria for membership proposed in the draft Article 4 of the Agreement.[231] The consultations held with the secretariat of FAO

[224] Agreement for the establishment of Indian Ocean Tuna Commission (adoption 25 November 1993, entry into force 27 March 1996) 1927 *UNTS* 330 (hereinafter 'IOTC Agreement').
[225] On 23 September 1965 Mauritius and the UK held a meeting "Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30pm, 23 September 1965" concluding what is known as the 'Lancaster House agreement', a copy can be found in the Annex 33 of the UK's written Statement to the ICJ, available online at: https://www.icj-cij.org/public/files/case-related/169/169-20180215-WRI-01-02-EN.pdf
[226] A few weeks after the decision to detach the Chagos from Mauritius UN General Assembly passed a resolution stating that detachment of part of the colonial territory of Mauritius was against customary international law. See, UNGA Resolution 2066 (16 December 1965).
[227] Notably, the UK and Mauritius begun negotiating on this matter.
[228] See Annexed Statements of Mauritius and France regarding Tromelin Island and the EU Statement in relation to Comoros' Statement during the meeting regarding sovereignty over the Island of Mayotte during the 25th Session of the IOTC (2021) 7-11 June 2021 (Doc IOTC-2021-S25-R[E]) Appendix 13, p. 77 and 81. Report of the Session available online at: https://iotc.org/documents/report-25th-session-indian-ocean-tuna-commission.
[229] Currently, there are 30 member states in IOTC, including some DWFNs.
[230] Report of the 102nd session of the Council of FAO, 9 – 20 November 1992, held in Rome (Doc CL 102/REP) para 209, available online at: https://www.fao.org/3/t0723e/T0723E06.htm#6.3
[231] Report of the 27th session of the Conference of FAO, 6-24 November 1993, held in Rome, para 272, available online at: https://www.fao.org/3/x5586E/x5586e00.htm#Contents

and the governments concerned, including the UK, France and Mauritius, ensued a compromise.

The compromise formula consisted of three elements. First, the language that caused disagreements was deleted from Article 4 of the IOTC, i.e., "states responsible for the international relations of territories situated wholly or partly within the Area to become Members of the Commission in respect of such territories".[232] The redrafted version read as "coastal States or Associate Members situated wholly or partly within the Area"[233] and parties were "free to adopt their own interpretation of these provisions".[234] Second, an additional paragraph was added[235], giving safeguards to the parties that "[n]othing in this Agreement, nor any act or activity carried out in pursuance of this Agreement, shall be interpreted as changing or in any way affecting the position of any party to this Agreement with respect to the legal status of any area covered by this Agreement".[236] This is, in effect, similar to the 'no prejudice' clauses found in other agreements discussed in this chapter. Third, the formula also mentioned that the UK and Mauritius exchange bilateral assurances "as may be deemed necessary to safeguard the legal position of each of the parties on the sovereignty issue" and make practical arrangements regarding the modalities of their participation in the IOTC.[237] Indeed, the UK and Mauritius concluded a bilateral arrangement concerning fisheries, establishing the British-Mauritian Fisheries Commission (BMFC).[238] The Joint Statement establishing the BMFC was based on an agreed "formula on Sovereignty", similar to assurances found in the Barcelona Convention, the CCAMLR and AT, that reserved the positions of the parties' vis-à-vis each other concerning the Chagos Archipelago and the surrounding maritime areas.[239] However, the BMFC was short

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[232] JJ Kambona and SH Marashi, 'Process for the establishment of the Indian Ocean Tuna Commission' *FAO Fisheries Circular*, No. 913 (FAO, 1996) para 97, available online at: https://www.fao.org/3/w1750e/W1750E05.htm.
[233] Article 4(1)(a)(i) of IOTC Agreement.
[234] Report of the 103rd session of the Council of FAO, 14 – 25 June 1993, held in Rome (Doc CL 103/REP) para 223(a) available online at: https://www.fao.org/3/t0810e/T0810E06.htm
[235] Ibid, para 223(b).
[236] See Article 4(6) of IOTC Agreement.
[237] Report of the Council of FAO (n 227) para 223(c).
[238] 'Joint Statement on Conservation of Fisheries of 27 of January 1994', See annex 62 of the UK's counter Memorial in the *Chagos MPA Arbitration*, 15 July 2013, Annex 62, available online at: https://pcacases.com/web/sendAttach/1886
[239] Ibid, Joint Statement on Conservation of Fisheries, para 1.

lived, lasting only five years, as Mauritius refused to participate after the last meeting in 1999.[240]

The IOTC Agreement mandates the IOTC, as an RFMO, to manage tuna and tuna-like species, which are highly migratory species, in the Indian Ocean and adjacent seas.[241] This means that the decisions, or rather, resolutions (binding) and recommendations (non-binding), of IOTC apply both within and beyond national jurisdiction. The exact area of competence of IOTC is "the Indian Ocean and adjacent seas, north of the Antarctic Convergence, insofar as it is necessary to cover such seas for the purpose of conserving and managing stocks that migrate into or out of the Indian Ocean".[242] According to article 5 of the IOTC Agreement, the objective of the Commission is to promote cooperation among its members for the conservation and optimum utilization of stocks covered by the Agreement and encouraging sustainable development of fisheries. To achieve these objectives, the IOTC Agreement assigns four key functions and responsibilities to the IOTC.

First, IOTC is to keep under review the conditions and trends of the stocks and to gather, analyse and disseminate scientific information, catch, effort statistics and other

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According to para 1(1):
"Nothing in the present joint statement or anything resulting from it is to be interpreted as:
(a) A change in the position of the United Kingdom with regard to sovereignty or territorial and maritime jurisdiction over the British Indian Ocean Territory (Chagos Archipelago) and the surrounding maritime areas;
(b) A change in the position of the Republic of Mauritius with regard to sovereignty or territorial or maritime jurisdiction over the Chagos Archipelago (British Indian Ocean Territory) and the surrounding maritime areas;
(c) Recognition of or support for the position of the United Kingdom or the Republic of Mauritius with regard to sovereignty or territorial and maritime jurisdiction over the British Indian Ocean Territory (Chagos Archipelago) and the surrounding maritime areas;
(2) No Act or activity carried out by the United Kingdom, the Republic of Mauritius or third parties as a consequence and in implementation of anything accepted in the present Joint Statement shall constitute a basis for affirming, supporting, or denying the position of the United Kingdom or the Republic of Mauritius regarding the sovereignty or territorial and maritime jurisdiction over the British Indian Ocean Territory (Chagos Archipelago) and the surrounding maritime areas."

[240] According to the UK's submissions in the *Chagos MPA Arbitration* "[t]he BMFC operated with some success for five years" and "within the Commission Mauritius proposed a joint system for issuing commercial fishing licences" for the Fisheries Conservation and Management Zone of BIOT, which was rejected by the UK. See, *Chagos MPA Arbitration,* Counter Memorial of the UK, 15 July 2013, p. 62, footnote 170; and *Chagos MPA Arbitration,* Memorial of Mauritius, Annex 119, letter dated 8 July 2003 from the Director of Overseas Territories Department, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London.

[241] Article 3 of IOTC Agreement.

[242] Ibid, Article 2.

relevant data. Second, the IOTC is to encourage, recommend, and coordinate research and development activities in respect of the stocks and fisheries covered by the IOTC, including capacity building and transfer of technology. Third, the IOTC adopts Conservation and Management Measures (CMM) based on scientific evidence and; finally, the IOTC keeps under review the economic and social aspects of the fisheries, in particular, bearing in mind the interests of developing coastal states.[243] Three subsidiary bodies assist the IOTC to undertake its mandate.[244] The most important and relevant for this chapter being the Scientific Committee, as an illustration of the technical and scientific nature of cooperation at the regional mechanisms, was established by the virtue of the IOTC Agreement[245] as an advisory body to the Commission. On substantive matters, the IOTC make decisions and recommendations by a majority vote, unless otherwise provided, and majority of the members of the IOTC constitutes a quorum, in accordance with the IOTC Agreement.[246] In relation to binding decisions on conservation and management measures, the IOTC adopts them by "two-thirds majority of its Members present and voting".[247] Any recommendations of the IOTC concerning conservation and management of the stocks are adopted by a simple majority of its Members present and voting.[248] In relation to the implementation of the conservation and management measures, which become binding on members, the IOTC Agreement places responsibility on the members to take legislative action at the national level and in turn report to the IOTC "an annual statement of actions" taken pursuant to measures adopted by the IOTC.[249]

As mentioned above, the management measures apply both within and beyond national jurisdiction, which is significant in the context of existing disputed maritime areas. It was presumed that adoption of measures at the regional level, whereby all states have to apply the same measures in both areas within national and beyond national jurisdiction, would reduce the fixation on 'who' is the coastal state that gets to

[243] Article 5 of IOTC Agreement.
[244] Apart from the Scientific Committee, two other subcommittees have been established: Standing Committee on Administration and Finance, and the Compliance Committee.
[245] Article 12 of IOTC Agreement.
[246] Ibid, Article 5(2).
[247] Article 9(2) of IOTC Agreement.
[248] Ibid, Article 9(8).
[249] Article 10(1) and 10(2) of IOTC Agreement.

decide what measures apply in their maritime areas.[250] However, in this case, the presumption does not hold true, and cooperation cannot be regarded as 'successful'.

Although the UK and Mauritius have been cooperating for many years through the IOTC, Mauritius has chosen to use the IOTC as a forum for bringing about change rather than a forum for cooperation. These recently exacerbated problems are part of Mauritius broader policy of challenging, by all available means, the UK's continued control over the Chagos Archipelago. At the 23rd meeting of the IOTC in 2019, Mauritius formally requested that the Commission terminate the UK's membership to the IOTC as a 'coastal State situated wholly or partly within the area of competence' of the IOTC as defined in Article 2 of the IOTC Agreement.[251] The Chairman of the Commission postponed the consideration of this agenda item to the 24th meeting to ensure delegations have enough time to consult with state authorities on the matter.[252] At the time of writing, a formal decision has yet to be made by the IOTC as the Commission only dealt with urgent matters during the 24th session due to the ongoing covid-19 pandemic. During the 25th meeting the issue was included under agenda item 15 'any other business' as 'Participation of the United Kingdom as a coastal state vis-à-vis "BIOT"' but no formal decision was made or discussed.[253] The issue appeared again at the 26th meeting, the Commission confirmed that is holding consultations with the UK and final determination will be made at the 27th meeting.[254]

Mauritius, determined to bring the matter to a conclusion, invokes legal arguments including the Chagos Advisory Opinion of the ICJ[255], the United Nations General

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[250] For example, Article 64 of the LOSC also employs language referring to 'the coastal state' and 'other states' whose national fish in the region to cooperate through appropriate organisations to ensure conservation. Similarly, the Article 7(2) of UNFSA focuses on achieving compatibility and places a duty on both coastal states and states fishing on the high seas to cooperate to achieve compatible conservation and management measures for the high seas and in areas under national jurisdiction.
[251] Mauritius' request for applying the procedure for termination of the UK's membership as a coastal state during the 23rd IOTC Meeting (2019) 17-21 June, (Doc IOTC–2019–S23–R_rev1[E], p. 10, para 7). Mauritius' full statement available in Appendix 2 (c), at p. 30, available on IOTC website at: https://www.iotc.org/documents/Commission/23/Report
[252] Ibid, para 9.
[253] The 25th meeting of IOTC (2021) 7- 11 June (Doc IOTC–2021–S25–R[E], p. 18-19) available online at: https://www.iotc.org/documents/report-25th-session-indian-ocean-tuna-commission
[254] The 26th meeting of the IOTC (2022) 16- 20 May 2022 (UN Doc IOTC–2022–S26–R[E], p 11, para 11) available online at: https://iotc.org/documents/report-26th-session-indian-ocean-tuna-commission.
[255] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, p. 95

Assembly Resolution 72/295 of 22 May 2019 and the Judgment of 28 January 2021 of the Special Chamber of ITLOS in the *Mauritius v. Maldives*.[256] Basing its arguments on these authorities, Mauritius considers herself "the only State lawfully entitled to exercise sovereignty and sovereign rights over the Chagos Archipelago and its maritime zones, as the coastal State and that the United Kingdom is not in a position to claim any rights over the Chagos Archipelago. The United Kingdom cannot accordingly be a member of the IOTC as a coastal State".[257] The UK until very recently rejected these claims, maintaining that the IOTC is not the right forum to discuss these matters, arguing that sovereignty dispute is a bilateral dispute between the UK and Mauritius which serves only to distract focus from important fisheries management issues of the IOTC.[258] On November 3rd 2022 the UK Secretary of State for Foreign, Commonwealth and Development Affairs made a statement announcing, at the UK Parliament, that negotiations between the UK and Mauritius regarding the exercise of sovereignty over the Chagos archipelago had begun.[259]

There are processes available within IOTC to pursue these claims, which Mauritius is now utilising. However, it is to be seen whether the consultations with the UK and the Commission will resolve the issue concerning the status of the UK in the Commission. The consultations are being carried out pursuant to article 4(4) of the IOTC Agreement, which provides that in case any member of the Commission ceases to meet the membership criteria under paragraphs 1 or 2, the continued membership of any member of the Commission is a matter for the Commission to decide, after consulting with the member concerned.[260] If the UK were to agree to its deemed withdrawal as a coastal state, Mauritius would add another to its political and legal 'victories' against the UK. It seems that Mauritius legal strategy of mounting tensions on the UK is slowly producing some results. Nonetheless, the UK would still be eligible to accede to the IOTC Agreement as a state whose vessels engage in fishing in the Area.[261]

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[256] *Mauritius v. Maldives* (Judgment on Preliminary Objections).
[257] Statement of Mauritius in the 25th meeting of IOTC (n 250) included in the Appendix 13, p. 78
[258] The UK statements in Appendix 2 (d) during the 23rd IOTC Meeting (n 248) at p. 33.
[259] Statement made by James Cleverly on BIOT/Chagos Archipelago 3 November 2022 (HCWS354).
[260] Article 4(4) of the IOTC Agreement.
[261] Ibid, Article 4(1)(a)(ii).

The other option for resolving the dispute concerning the UK's continued membership of the IOTC as a coastal state is available under the dispute settlement procedure laid out in the Agreement.[262] According to article 23 of the IOTC Agreement, "[a]ny dispute regarding the interpretation or application of the Agreement, unless settled by the Commission, shall be referred for settlement to a conciliation procedure adopted by the Commission".[263] However, this procedure is not developed and is non-binding – as pointed out by the independent performance review of the IOTC.[264] If this procedure also fails to settle the dispute concerning membership, "it may be referred to the [ICJ] in accordance with the Statute of the [ICJ], unless parties to the dispute agree to another method of settlement".[265] Mauritius have already showed her readiness to fight all the legal battles available against the UK, in relation to the sovereignty dispute over the Chagos Archipelago, and the IOTC is no exception. At the 25th meeting of the IOTC, Mauritius highlighted that she will invoke her rights under the Agreement, referring to Article 23, and international law, if the Commission fails to make "clear and immediate decision" confirming that the UK cannot be a member of the IOTC as a coastal State.[266] Regardless of how Mauritian efforts conclude in the future, for the time being, the dispute is being made the larger agenda item, diverting focus from the mandate of the IOTC, that is conservation and management of stocks covered by the Agreement.

3 Challenges posed by disputed maritime areas for regional frameworks

3.1 *Bilateral disputes – a shadow over governance objectives*

Perhaps one of the most obvious, albeit not inevitable, challenges is that disputes at the bilateral level between two states, may impede their willingness to cooperate at the regional level. In some cases, lack of political will or readiness to set the dispute aside may render cooperation very challenging. For example, the experience of IOTC provides a clear case of a bilateral dispute between two members emerging as

[262] Note from the Legal Office of the FAO for the 23rd IOTC Meeting (2019) 13 June 2019 (Doc IOTC-2019-S23-14) available online at: https://www.iotc.org/documents/note-legal-office-fao.
[263] Article 23 of the IOTC Agreement.
[264] Ibid. The Second Performance Review of IOTC (Doc IOTC–2016–PRIOTC02–R[E]) available online at: https://iotc.org/documents/report-2nd-iotc-performance-review
[265] Ibid.
[266] See Mauritius' Statement at the 25th Commission Meeting (n 250) at p. 79.

challenge for the regional cooperation mechanism. It has been argued that existence of disputed territories and disputed maritime areas in the Indian Ocean "hinder the performance and cooperation potential of IOTC members".[267] During the recent meetings of the IOTC, lengthy interventions concerning which state is the rightful coastal state in relation to the Chagos Archipelago and its surrounding waters have cast a cloud on the ability of the disputing parties to cooperate pending the resolution of the dispute. This is due to Mauritius' determination to settle this dispute and reclaim the Chagos Archipelago once and for all, regardless of the UK's lack of willingness to cede its sovereignty. Therefore, in this case the regional institution has been used to exacerbate tensions.

Another example in point is COBSEA. China has been strongly resisting even the multilateral 'discussion' of any issue in relation to South China Sea for many years.[268] This attitude meant that the two projects coordinated by the COBSEA and UNEP/GEF in relation to South China Sea could not include disputed maritime areas or features. The first project called "Reversing Environmental Trends in the South China Sea and Gulf of Thailand" was adopted in 2002 and terminated in 2008,[269] with the adoption of the second project – Strategic Action Programme for the South China Sea (SCS SAP).[270] It is worth noting that both projects progressed very slowly from the negotiation phase to operational phase.[271] For the first project, the delays were the result of disagreements between governments over the proposed project including whether binding obligations were to be created for states[272] and the scope of the project to include sensitive disputed maritime areas.[273] Therefore, the UNEP and COBSEA treaded very carefully to ensure compromise on these points; indeed the several UNEP staff, including the executive director and programme officer of

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[267] Hussain Sinan and Megan Bailey, 'Understanding Barriers in Indian Ocean Tuna Commission Allocation Negotiations on Fishing Opportunities' (2020) 12 *Sustainability* 6665

[268] Ramses Amer and Li Jianwei, 'From DOC to COC' in Keyuan Zou (ed) *Routledge Handbook of the South China Sea* (Routledge 2021) 359; Craig A Snyder, 'Building Multilateral Security Cooperation in the South China Sea' (1997) 21 *Asian Perspective* 5, 27.

[269] Termination Report of the UNEP/GEF South China Sea Project (n 134).

[270] See SCS SAP (n 135).

[271] While COBSEA expected the second project's, SCS SAP, inception phase to being no later than June 2017, according to information available at the SCS SAP website the first inception phase meeting was held online on 30 July 2020 (Report of the 23rd Intergovernmental Meeting of COBSEA, 27-28 February 2017 (UN Doc. UNEP/COBSEA IGM 23/7) 7 March 2017, para 76).

[272] Report of the 13th Meeting of the COBSEA (n 138) 39-40.

[273] Report of the 14th Meeting of the COBSEA (n 138) paras 20-23.

EAS/RCU, had numerous meetings with China to facilitate negotiations, as explained earlier.[274] Yet this compromise meant that the project did not include disputed maritime areas.[275] The sensitivity around the South China Sea issues are striking in the first UNEP/GEF project document. For example, the document's first footnote says "the term 'South China Sea' is used in its geographic sense and does not imply recognition of any territorial claims within the area".[276] While being of a neutral tone and open to positive interpretation, i.e. that participating states are taking an approach to set aside their sovereignty disputes to cooperate in the management of marine and coastal environment, the next footnote points to the contrary when it says, "[n]o activities shall be undertaken under this project in disputed areas of the South China Sea, nor shall issues of sovereignty be addressed directly or indirectly through project activities".[277] These footnotes were essentially responses of the UNEP to China's concerns and demands for participating in the project.[278] While it is progress that disputing states of South China Sea are finding ways to cooperate on common concerns, the exclusion of disputed maritime areas is a significant short-coming of the projects.[279] As the reports of the Strategic Action Programme themselves note, proper management of marine resources require harmonious transboundary action – focusing on certain coastal areas is not sufficient to address common concerns and problems identified by the COBSEA.

These two cases show that cooperation between disputing states and existence of disputed maritime areas are a risk factor for 'successful' cooperation at the regional level. In fact, the governance of commons may become untenable if the parties do not agree over the status of the dispute and ready to cooperate despite it, and as shown by the latter case, disputes over maritime areas may inhibit actions for the protection and preservation of the marine environment and ecosystems.

[274] Ibid, paras 20-30.
[275] UNEP/GEF, South China Sea Project Document (n 145), at p.3, para 13.
[276] Ibid, see footnotes at p. i and 1, and further paras 13 and 24,
[277] Ibid.
[278] Chen (n 140) 135-136.
[279] UNEP/GEF, South China Sea Project Document (n 145), Annex B.

3.2 *Weak frameworks and institutions*

Territorial and maritime disputes between states surrounding the South China Sea have caused challenges for regional initiatives. Even when regional arrangements are established, disputes in the region still have a bearing on these institutions.[280] Arguably, the disputes in the region, along with associated lack of trust between these states, are the biggest obstacles to developing robust frameworks of cooperation that are not merely general and ambiguous.[281] Under the auspices of UNEP, however, the region houses COBSEA which facilitates regional environmental cooperation. While UNEP is in support of developing a stronger framework for environmental cooperation in the region, it has faced several roadblocks. For example, one of the goals of the first South China Sea project – Reversing Environmental Degradation Trends in South China Sea and the Gulf of Thailand – was the development of a Strategic Action Programme that would recommend a legal framework for improving regional cooperation for the management of environmental concerns. However, some states of the region did not change their views about legally binding mechanisms,[282] which they expressed during the preparatory phase of the project at the intergovernmental meetings of COBSEA.[283] So much so that, UNEP had to let go of the idea and language of recommending 'legal frameworks' to improve cooperation and move to adaption of improved 'mechanisms' for regional cooperation.[284]

While soft-law or non-binding frameworks are an attractive option in some cases due to geopolitics, flexibility and expediency offered by such mechanisms in addressing issues, there are associated challenges with such 'weak' mechanisms. Non-binding

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[280] While out of scope for discussion in this chapter, international relations literature discusses the idea of 'ASEAN way' to explain lack of institutionalised regionalism. Instead, regionalism focuses on consultation and dialogue rather than institutionalising cooperation, which is arguably a symptom of lack of trust between states and their multiple disputes. For more see, Roberts (n 132).

[281] Mark J Valencia, 'Regional maritime regime building: prospects in Northeast and Southeast Asia' (2000) 31 *Ocean Development and International Law,* 223, 240.

[282] For example, China and Malaysia stressed at the terminal evaluation of the project that they would not participate in components of the Strategic Action Plan that would contain legally binding elements, see UNEP, Terminal Evaluation of Reversing Environmental Degradation Trends in the South China Sea and the Gulf of Thailand, 22 May 2009, at p. 34, available online at: https://wedocs.unep.org/bitstream/handle/20.500.11822/7400/Terminal_evaluation_of_the_UNEP_GEF_project_Reversing_environmental_degradation_trends_in_the_South_China_Sea_and_Gulf_of_Thailand.pdf?sequence=1&isAllowed=y

[283] It is to be noted though that Viet Nam and Philippines showed support for a 'legal framework', see UNEP, 13th intergovernmental meeting of COBSEA (n 138) paras 39-43.

[284] UNEP/GEF, South China Sea Project Document (n 145), Annex B.

frameworks are challenging because the implementation of the agreed upon framework, and the actions agreed within, rest solely on the goodwill of the parties.[285] Moreover, bodies created by non-binding frameworks usually lack necessary competence to make decisions and create vigorous system for implementation. COBESA RAP MALI is another example that help illustrate this point.[286] COBESA recently revised its RAP MALI, which include a work plan of key actions (four key actions) that include multiple smaller actions, such as strengthening national and regional legal instruments on marine litter, for its implementation by either the Secretariat or participating countries or both.[287]

Actions identified for the Secretariat are under way. For example, as provided for in the work plan, COBSEA established a Working Group on Marine Litter (WGML) to support implementation of the RAP MALI.[288] Its role is to advise and assist COBSEA Intergovernmental Meeting and the Secretariat[289] and to monitor state actions through updates provided.[290] It is noteworthy that COBSEA has been intensifying its efforts to strengthen the institutional capacity for implementation in this context. Especially in relation key action 4 on monitoring and assessment of marine litter, which consist of multiple smaller actions, including preparation of regional guidance for states.[291] COBSEA and the WGML prepared 'COBSEA Regional Guidance on Harmonized National Marine Litter Monitoring Programmes' which include recommendations that are both regionally appropriate and in line with globally established guidelines, methods, and standards.[292] The Regional Guidance on Harmonisation aims to strengthen national monitoring programmes by building on existing capacities and

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[285] Nien-Tsu Alfred Hu, 'Semi-enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea' (2010) 41 *Ocean Development and International Law* 281, 304 and 307.
[286] COBSEA, Revised Regional Action Plan on Marine Litter 2019 (RAP MALI), available online at: https://wedocs.unep.org/bitstream/handle/20.500.11822/30162/RAPMALI_19.pdf?sequ%E2%80%A6
[287] Detailed descriptions of Key Actions are available in appendix 2, Ibid.
[288] COBSEA, RAP MALI (n 283), Action 4.1.1.
[289] Ibid, see Annex 3 for more details on purpose and functions of the Working Group.
[290] COBSEA, RAP MALI (n 283), para 15.
[291] COBSEA, RAP MALI Work Plan of Key Actions (n 283) action 3 and 3.2.1.
[292] Adopted by silence procedure on 12 November 2021, Report of 25th Intergovernmental Meeting of COBSEA, 8-9 September 2021 (Doc UNEP/COBSEA IGM 25/9 rev. 1) para 63; COBSEA & Commonwealth Scientific and Industrial Research Organisation (CSIRO), *Regional Guidance on Harmonized National Marine Litter Monitoring Programmes: Monitoring Efforts and Recommendations for National Marine Litter Monitoring Programmes* (Bangkok: United Nations Environment Programme, 2022).

aligning efforts at the regional and global levels. In this connection, during its third meeting, WGML also established the Marine Litter Monitoring Expert Group[293] to support its work by providing "scientific and technical expertise and advice in support of the development of harmonised national marine litter monitoring programmes".[294] In addition, the adopted regional guidance further clarifies the function of the Expert Group on Monitoring as "support[ing] the implementation of the Regional Guidance".[295] The future progress and implementation of states based on the guidance on harmonization on monitoring and other components of this key action is, of course, yet to be seen.

Whilst COBESA is clearly evolving as a regional mechanism, and experiencing greater institutionalisation, its efforts lack mandatory character. To give an example from the document outlining 'Regional Guidance' just mentioned, the introduction states that "this report is not intended as a top-down set of instructions to restructure national monitoring efforts [of marine litter], but rather a collaboration between participating countries seeking to make changes for improved outcomes toward regional harmonization of monitoring approaches".[296] More generally, to quote RAP MALI, "participating countries are *encouraged* to make their *best effort* to ensure that [RAP MALI] is implemented, in a coherent manner".[297] The language used is of course a symptom of the non-binding character of cooperation through COBSEA. However, such phrases and wording weaken the force of the framework imposed upon the parties and arguably undermine the efforts of creating robust institutional frameworks.

3.3 *Reaching agreements on, and implementing, conservation measures/ actions*

Without doubt, implementation and enforcement of any regional conservation or management measures are not without challenges even when disputed maritime

[293] COBSEA, RAP MALI Work Plan of Key Actions (n 283) action 3.1.
[294] COBSEA, Report of the 3rd Meeting of the Working Group on Marine Litter, 29-30 June 2021 (Doc UNEP/COBSEA WGML 3/9) p. 9 available online at: https://wedocs.unep.org/bitstream/handle/20.500.11822/36951/WGML3.pdf?sequence=%E2%80%A6
[295] Regional Guidance on Harmonized Marine Litter Monitoring Programme (n 289) at p. 3.
[296] Ibid, p. 3.
[297] Revised RAP MALI (n 283) para 16.

areas or mixed disputes are not at issue.[298] While there is limited scope to discuss in detail those challenges shared in general by many regional environmental mechanisms, the challenges discussed in previous section hint at some of the reasons why implementation of regional frameworks are challenging, such as lack of robust institutions of implementation and compliance and the language choice of the framework etc. Disputed maritime areas add another layer to those challenges, heightening and further complicating agreement on, implementation, and enforcement of measures or actions. These are significant challenges for regional institutions because they directly impact on the ability or 'success' of the institution/framework to achieve intended objectives as well as effectiveness of measures/actions whether it is conservation and management of living resources and protection of marine environment. To start with reaching of agreements within regional frameworks, existence of disputed maritime areas cause difficulties, unsurprisingly, for negotiations on substance of conservation measures or actions – due to perceived conflicting interests – or over geographical scope, of the conservation measures i.e., whether disputed maritime areas would be covered or not. For example, as discussed above, the UNEP/GEF South China Sea project did not include any disputed maritime areas or features, due to strong resistance from China. In that instance, leaving of disputed maritime areas outside the framework agreed between states raises questions about the effectiveness of actions and measures undertaken for achievement of common goals.

In relation to CCAMLR, the CAMLR Commission adopts conservation measures by consensus, meaning that disagreements between states may slow progress of adoption of certain conservation measures, and hence, challenge "developing effective environmental measures".[299] The most recent example of such lack of consensus, or failure to reach agreement, on conservation measures, faced by the CAMLR Commission is in relation to the catch limit for Patagonian toothfish fishery in sub-Area 48.3, which includes disputed South Georgia and South Sandwich Islands

[298] Kjell Grip 'International marine environmental governance: a review' (2017) 46 *Ambio*, 413, 421.
[299] James Harrison 'Towards Integrated Management of Regional Marine Protected Area Networks: A Case Study of Regime Interaction in the Southern Ocean' (2021) 9 *The Korean Journal of International and Comparative Law* 212, 226.

and their maritime areas.[300] This is particularly problematic for the work of CCAMLR for multiple reasons, but importantly for the purposes of this thesis, it fuels the fire between two contracting parties, namely, UK, and Argentina, jeopardising their cooperative attitude towards the management of marine living resources in the Convention Area.[301] While the lack of consensus on catch limit did not result from disagreements between the UK and Argentina, but due to Russian delegates' blocking consensus[302], it has nonetheless resurrected discussions/statements on the disputed islands and maritime areas that has been absent since the 34th Commission Meeting.[303] The lack of consensus, and thus, ensuing inability to agree on conservation measures, led the UK delegation to state that "the UK will consider its next steps to protect its interests in Subarea 48.3, consistent with the CAMLR Convention and in accordance with its rights and responsibilities under Convention and relevant international law".[304] What this potentially means is the UK considers adopting its own conservation measures as a coastal state with jurisdiction over maritime areas appertaining to South Georgia and South Sandwich Islands, located in sub-area 48.3.[305] This position is based upon the statement made by the Chairman to the Final Act of the Conference on the Conservation of Antarctic Marine Living Resources.[306] However, the right of the UK to do so, based on Chairman's Statement, has been rejected on multiple occasions by Argentina in relation to the disputed

[300] See, the 40th CAMLR Commission Meeting (2021) 18- 29 October 2021, (Doc CCAMLR-40, p. 11, para 6.21).
[301] The other issues such as the repercussions for integrity of CCAMLR, and the spirit of cooperation with which states participated in the work of the Commission, is out of scope of this chapter.
[302] The UK and Argentina both expressed disappointment with Russia's blocking of consensus. The UK asked all members to consider how they might assist in resolving the impasse that harms interests of all members (Doc CCAMLR-40, p. 11-13, para 6.22).
[303] Argentina and the UK made statements announcing the "constructive cooperation" between UK, Argentina, and other observers, to avoid sensitive issues surrounding the sovereignty over South Georgia and South Sandwich Islands during the meetings, see Argentina and UK statements at the 35th Commission Meeting (2016) 17- 28 October 2016, (Doc CCAMLR-XXXV, p. 70-71, paras 12.5-12.6).
[304] UK statements at the 40th CAMLR Commission Meeting (n 297) p. 11-13, para 6.22.
[305] The UK has taken such action before. As an example, see below the discussion on the UK's invocation of the Statement of the Chairman, in particular paragraphs 4 and 5, in the context of international scientific observation provided for in the CCAMLR, retaining its right to decide on the manner of implementation of the scheme in the maritime areas appertaining to South Georgia and South Sandwich Islands. *See* the 17th CAMLR Commission Meeting (1998) during the meeting of the Standing Committee on Observation and Inspection 28- 30 October (Doc CCAMLR-XVII, Annex V, p. 15, para 4.15).
[306] Statement made by the Chairman in the Final Act of Conference on 19 May 1980, p.112, available online at: https://documents.ats.aq/keydocs/vol_1/vol1_11_CCAMLR_Final_Act_e.pdf

maritime areas off the coasts of South Georgia and South Sandwich Islands.[307] Argentina points out, measures that are legally applicable in the subject matter areas are only those adopted within the multilateral system of the Convention and, any 'unilateral' measures or actions taken by what Argentina considers 'illegitimate authorities' in those territories and maritime zones are "illegal and not valid".[308] Therefore, in this context, the exercise of coastal state jurisdiction by the UK in maritime zones of South Georgia and South Sandwich Islands (which are part of the Convention Area in question) may cause a significant backlash. It may even threaten the stability created after years of cooperation.

Assuming that challenges in relation to the adoption of conservation measures are overcome and all states, including disputing states, agree to the same measures through the regional framework, are their implementation and enforcement without problems? The experience in the sub-Antarctic region demonstrates challenges posed by disputed maritime areas for the implementation of measures adopted by the CAMLR Commission. For example, the scheme of international scientific observation, provided for in Article 24 of CCAMLR, has been challenging to implement between UK and Argentina.[309] Similarly, in relation to implementation of measures adopted by the CAMLR Commission, Argentina made statements expressing that it does not accept UK actions based in or operation out of the disputed islands, including policing in areas beyond national jurisdiction found in the CCAMLR Area engaged in IUU fishing.[310] While this chapter argues above that such statements in this particular context, enable Argentina and the UK to pursue cooperation by reminding each other of their respective position in terms of the dispute, such statements also damage cooperative attitude and potentially hamper implementation efforts. How, then, the challenges,

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[307] See Argentina's general position stated during the 15th CAMLR Commission Meeting (1996) (Doc CCAMLR-XV, p. 81-83, para 13.1-13.13) and also in relation to particular contexts, the 17th CAMLR Commission Meeting (n 302) para 4.13; the 40th CAMLR Commission Meeting (n 297) para 6.23.
[308] Essentially, this was a response that Argentina considers any 'unilateral' measures taken by what Argentina considers 'illegitimate authorities' in those territories and maritime zones as illegal and invalid. Therefore, exercise of coastal state jurisdiction by UK in maritime zones of South Georgia and South Sandwich Islands (which are part of the Convention Area in question) would be controversial. (Doc CCAMLR-40, p.13, para 6.23).
[309] See section 2.3.3 above.
[310] Ibid.

posed by the existence of a dispute over maritime areas between states, in relation to implementation can be addressed in practice?

3.3.1 Some thoughts on a way forward for implementation challenges

One potential way to navigate such problems is negotiation of an arrangement on the modalities of implementation of obligations assumed under regional governance frameworks. While the contents of such modalities of course will depend on agreement between states, two proposals come to mind. A practical solution can be agreeing on an arrangement that exempts the exercise of coastal state jurisdiction in disputed maritime areas vis-à-vis other disputing state. Rather, disputing states implement and enforce their obligations and regional standards based on nationality principle between the vessels of disputing states. In relation to the vessels or activities of third states, agreement can provide for either proximity or preparedness to respond in case of a suspected cases of violation of regional standards. States can also agree to exchange information on and reporting of suspected cases of violations by third party vessels. Alternatively, the arrangement can also provide for procedures on cooperation in implementation and enforcement vis-à-vis third state or provisionally 'divide' the disputed areas into zones, where each state is assigned to a specific zone for monitoring and implementation of obligations. This proposal is similar to a provisional arrangement but differ, in the sense that, disputing states are agreeing on the modalities of implementation of obligations arising from regional agreements. In saying that modalities of implementation of regional obligation can be part of the bilateral agreement or indeed the bilateral agreement can 'nest' in the broader governance framework, similar to the example of UK and Denmark.[311]

Another potential solution could be 'pooling of jurisdictions' to create a body or a commission assigned with powers regarding all matters concerning obligations arising from regional agreements on protection and preservation of marine environment and biodiversity, similar to the concept of the joint fisheries commission created by the UK and Mauritius. Disputing states can confer powers on this institution to undertake various tasks, normally undertaken by national institutions, such as granting fishing

[311] Discussed in section 4.1.3 of Chapter III.

licences, implementing, and enforcing quotas agreed at the regional level. Within the commission, different sub-committees can be created to deal with matters, such as a committee concerned with enforcement of fishing standards which could also coordinate the coast guards from each state to jointly patrol of the disputed maritime area.

4 Conclusion

This chapter has considered the relationship between disputed maritime areas and regional governance frameworks. The regional examples discussed show some variety in experiences in different regions, involving different parties and different institutions. In some cases, disputed maritime areas and disputing states can be increasingly problematic, to the extent that, regional institutions can become forum for exacerbating tensions. In other instances, regional institutions are forums for 'managing' the dispute via the uniting power of common concerns and common goals.

Resting on the assumption that regional governance institutions play a fundamental role within the framework of the LOSC and other international agreements in relation to the protection and preservation of the marine environment and biodiversity, this chapter aimed to contribute to the literature on disputed maritime areas and regional ocean governance and improve our understanding of their dynamic relationship. As this chapter demonstrates, disputed maritime areas impact regional governance and vice-versa. The examples analysed in this chapter demonstrate that regional institutions contribute to the 'management' of the dispute between states in various ways while at the same time contributing to the governance of the region's common concerns, i.e., protection of the marine environment and the conservation and management of living resources.

Participation in regional institutions and working on 'common concerns' alongside neutral parties shifts attention and 'fixation' from disputed maritime areas, diffusing tensions, to focusing attention on cooperation for the realisation of 'common goals' based on objectives set by each framework, such as improving the state of the marine environment and natural resources of shared maritime spaces. What is more, measures pursued by claimant states in pursuance of obligations arising from regional

agreements should not run into issues of legitimacy in the eyes of the other disputant, as they would, if undertaken unilaterally. Despite some hurdles, Argentina, and the UK's 'constructive cooperation' in CCAMLR illustrates the advantages of such institutional cooperation at the regional level for the management of disputed maritime areas.

On the other hand, disputed maritime areas are also shown to be quite problematic in some cases. It seems that such challenges almost always stem from the attitudes of states. This is the case with Mauritius and the UK. There seems to be a lack of agreement to disagree over the status of the dispute, and one party perceives continued cooperation as damaging to her claim over the Chagos Archipelago and surrounding maritime areas. Another observation is that the existence of disputes between multiple states in a region may impact the form of cooperation acceptable to states. Finally, the tensions between disputing states may impact the decision-making process in the regional governance mechanism and also the implementation and enforcement of decisions made at the regional level. It is important to understand these challenges and show that there are paths available to resolve some of the issues disputes may raise. However, the lesson learned is that these challenges can be overcome. Argentina and the UK use two tools in this regard: one is their 'constructive cooperation' at CCAMLR meetings and the other is the use of 'statements'. Another proposal for states is to come to some arrangement on modalities of implementation, an example being the arrangement between the UK and Denmark (discussed in Chapter III).

The overall purpose of this chapter is to illustrate that regional governance processes and institutions, seen as an additional layer of governance, contribute to the management of disputed maritime areas. They form an important part of the process of managing disputed maritime areas. This is particularly valuable because multilateral processes and institutions represent and have broader interests in relation to 'commons', that are beyond those of the two disputing states who are mainly focused on the exploitation of the natural resources of the maritime area as well as mostly defining their interests in terms of their claims over the maritime area. This chapter aimed to achieve two closely interconnected, but separate aims. First, this chapter

illustrated how regional governance institutions may complement management efforts at the bilateral level as multilateralism offers ways of overcoming challenges faced at the state-state level.[312] Second, this chapter explores the challenges that disputed maritime areas bring to regional institutions, and proposes ways to minimise such impacts, by drawing lessons from relatively 'successful' cases in this context. Overall, this chapter contributes to our understanding of the role of institutions in the 'process' of managing disputed maritime areas and more generally also how multilateralism may help disputing states to manage their disputes.

[312] Challenges were discussed in Introduction and chapters III and IV.

Chapter VI: The role of international courts and tribunals in the governance of disputed maritime areas

1 Introduction

There is a rich literature on the contribution of international courts and tribunals to settlement of international disputes and international peace and security and further development of the law.[1] In the context of the LOSC, the establishment of a compulsory dispute settlement system was seen as essential for reasons such as, protecting the integrity of the text and compromises struck.[2] There was a general sense that the provisions of the LOSC would only be acceptable "if their interpretation and application were subject to expeditious, impartial and binding decisions".[3] Yet, courts and tribunals have not only been concerned with protection of the integrity of the text and the compromises, but they have contributed to peaceful settlement of disputes.[4]

The arbitral tribunal in *Guyana v. Suriname* highlighted the role that judicial institutions can play in managing disputed maritime areas. In this case, Suriname protested against the exploratory drilling of Guyana in disputed maritime areas, however, the exchanges and negotiations between the parties failed to resolve the dispute. What *should* a state do face with such a dispute? According to the Tribunal, "[a] state… *should* resort to the compulsory procedures… in Section 2 of Part XV of the

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[1] See, for example, Gentian Zyberi 'The Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest', in Cecilia Marcela Bailliet, and Kjetil Mujezinovic Larsen (eds) *Promoting Peace Through International Law* (OUP, 2015) 344–367; see also Vaughan Lowe on functions of litigation 'The function of litigation in International Society' (2012) 61 *International and Comparative Law Quarterly,* 209.

[2] Robin Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use' (2017) 48 *Ocean Development & International Law*, 216.

[3] Statement of Ambassador Harry (Australia) of 5 April 1976, *Official Records of the UNCLOS III,* Vol V, p. 9 para 12.

[4] Robin Churchill, 'Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade' in D Freestone, R Barnes, and D Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP, 2006) 388-416 (focuses on the role of provisional measures orders in managing the dispute between states).

Convention".[5] The Tribunal further followed that provisional measures can be an option if circumstances so require.[6]

Against this backdrop, this chapter considers the role of adjudicative institutions, namely courts and tribunals, in the management of disputed maritime areas. The main research question of this thesis and the concept of governance (pillars of governance) calls for an examination of the role of courts and tribunals in disputed maritime areas. Therefore, this chapter explores the following question: In what ways can adjudicative institutions (courts and tribunals) contribute to the management of disputed maritime areas? In addition to answering this overall question, this chapter considers other doctrinal questions in relation to the 'rules' of the LOSC surrounding the submission of disputes relating to disputed maritime areas to compulsory procedures in circumstances where one of the parties to a dispute made a declaration removing sea boundary delimitations from the purview of compulsory procedures under the Convention in this context. The chapter intends to explore two questions: first, do disputes relating to interpretation and application of articles 74(3) and 83(3) of the LOSC come within the scope of disputes 'relating to sea boundary delimitations' excluded by a declaration made under article 298(1)(a)(i) of the LOSC? Second, if the answer is negative, how could a request for provisional measures contribute to the management of disputed maritime areas?

International courts and tribunals as institutions have a positive role to play, in the management disputed maritime areas. By focusing on provisional measures proceedings, this chapter aims to demonstrate how adjudicative institutions can contribute to the management of disputed maritime areas.

First, this chapter addresses the initial question of whether the scope of compulsory dispute settlement under Part XV of the LOSC cover disputes concerning obligations to enter into provisional arrangements and not to jeopardise or hamper the final agreement, pursuant to articles 74(3) and 83(3) of the LOSC. In doing so, this chapter

[5] *Guyana v. Suriname,* para 446. It is also important to remember that what the Tribunal has said may have been influenced by the threat of force.
[6] Ibid.

examines the text of article 298(1)(a)(i) of the LOSC to determine the meaning of the language ‘concerning articles 15, 74 and 83 relating to sea boundary delimitations’. The chapter then considers what kinds of submissions states may make to international judicial institutions by reference existing case-law. Finally, this chapter considers provisional measures proceedings. Section 3 focuses on the tests used by courts and tribunals to decide whether circumstances warrant an order and particularly considers the application of those tests in cases relating to disputed maritime areas. Section 4 analyses the procedure and measures ordered in earlier provisional measures orders and their impact on the dispute, exploring what this analysis illustrates about the role that judicial institutions play in managing disputed maritime areas.

2 Does the scope of compulsory dispute settlement, envisaged in Part XV, include disputes concerning articles 74(3) and 83(3) of the LOSC?

As discussed in Chapter I, some of the unresolved maritime boundary delimitation disputes may not be submitted to compulsory procedures for settlement, because of declarations made in accordance with article 298(1)(a)(i) of the LOSC. Therefore, an important question for this thesis is whether disputes arising pending delimitation concerning disputed maritime areas may be submitted to compulsory procedures provided in section 2, Part XV, when one of the parties made a declaration under article 298(1) of the LOSC. If yes, what role judicial institutions (international courts and tribunals) can play in managing disputed maritime areas? International courts and tribunals have not ruled on this issue to date and as such, the question is open to discussion and interpretation. Before this section attempts to interpret the relevant provisions of the LOSC to find an answer, it is worth remembering the wording of article 298(1)(a)(i) of the LOSC:

Article 298

Optional exceptions to applicability of section 2

1. When signing, ratifying, or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the

> procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> > (a)(i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles…

Answering the question whether articles 74(3) and 83(3) of the LOSC fall within the scope of this exception requires interpreting the words "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations".[7] Whether the reference to articles 74 and 83 cover the entirety of those provisions, i.e., include the subparagraph 3 relating to disputed maritime areas pending delimitation, is debatable. Differences of opinion can be found in the literature on the topic. Some argue that a declaration under article 298(1)(a)(i) of the LOSC covers the whole of articles 74 and 83 of the LOSC, meaning that it exclude obligations in subparagraph 3 from compulsory dispute settlement entailing binding decisions.[8] The other side argues that only boundary delimitation disputes are excluded pursuant to article 298(1)(a)(i) of the LOSC.[9] As explained below, this also author holds the latter view that the optional exception to jurisdiction of Part XV courts and tribunals should be interpreted narrowly.

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[7] Article 298(1)(a)(i) of the LOSC.

[8] Natalie Klein, 'Provisional Measures and Provisional Arrangements' in Elferink, Henriksen and Busch (eds) *Maritime Boundary Delimitation: The Case Law* (Cambridge University Press, 2018) 124-125. This interpretation is regarded as 'strong' by Youri Van Logchem, The Scope For Unilateralism in Disputes Maritime Areas in C Schofield and MS Kwon (eds) *The Limits of Maritime Jurisdiction* (2014) 195. Also advocating for a broad interpretation of words 'concerning' and 'relating', see Keyuan Zou & Qiang Ye, 'Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal' (2017) 48 *Ocean Development & International Law* 331, 335; Xuexia Liao, 'The Road Not Taken: Submission of Disputes Concerning Activities in Undelimited Maritime Areas to UNCLOS Compulsory Procedures' (2021) 52 Ocean Development & International Law 297, 313.

[9] Christine Sim 'Maritime Boundary Disputes and Article 298 of UNCLOS' (2018) 3 *Asia-Pacific Journal of Ocean Law and Policy* 232; Robert Beckman and Christine Sim, "Maritime Boundary Disputes and Compulsory Dispute Settlement: Recent Developments and Unresolved Issues" in Myron H Nordquist, John Norton Moore, and Ronan Long (eds) *Legal Order in the World's Oceans* (Brill Nijhoff, 2018) 228, 248.

2.1 Interpreting article 298(1)(a)(i) of the LOSC

2.1.1 'Concerning' articles 15, 74 and 83 'relating to' sea boundary delimitations

There are two key terms in this exception, these are: 'concerning' and 'relating to'. If this subparagraph only included the words 'concerning articles 15, 74 and 83' – without any further qualifiers – we would understand this to cover the whole of those provisions, including the subparagraphs. However, with the inclusion of the words '*relating to sea boundary delimitations',* immediately after identifying 'articles 15, 74 and 83' further qualifies and restricts the scope of the latter. If the drafters meant to exclude the entirety of those provisions, there would have been no need to refer to '*sea boundary delimitations*'. The use of those words must signify an intention, otherwise the drafters would have simply mentioned disputes concerning interpretation and application of articles 15, 74 and 83.[10] The negotiating history of the LOSC puts this word choice into perspective. The reason for including an optional right for states to exclude sea boundary delimitations from compulsory procedures is because certain delegations' maritime delimitation disputes with neighbouring states raised sensitive issues, including issues of sovereignty. As such they argued that maritime boundary delimitation should not be subject to compulsory procedures, unless both states agreed to refer the boundary delimitation dispute to a court or tribunal.[11] Other delegations were concerned, on the other hand, about 'watering down' the compulsory dispute settlement mechanism.[12] Consequently, inclusion of this optional opt-out was agreed in order not to jeopardise the whole dispute settlement system. Given this delicate balance that the LOSC rests on, it is preferable to interpret the exception narrowly.[13]

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[10] According to Van Logchem (n 8) 195, another interpretation is that, if the intention was to exclude only sea boundary delimitations would it not be logical to refer to only sub-paragraphs 1 and 2 of articles 74 and 83? It is the opinion of this author that such an interpretation does not give weight to the words 'relating to sea boundary delimitations' whereby the drafters make their intended scope of exclusion clear by use of those words instead of strict reference to the sub-paragraphs.

[11] Myron Nordquist et al (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary,* Vol V (Martinus Nijhoff Publishers 1993) para 298.22

[12] Ibid.

[13] Nordquist (n 11) para 298.13. When considering scope of the declarations that can be made and whether states can exclude only specific disputes, Nordquist et al argues that "As the basic idea of the Conference was to *limit* the maximum extent possible the available exceptions, it would be in the spirit of article 298 to permit narrower exceptions than those allowed therein" [emphasis added].

The argument for a narrow interpretation of the provision to only cover boundary delimitations is further supported by the existence of the words "those involving historic bays or titles".[14] Article 15 of the LOSC concerns delimitation of the territorial sea and, unlike articles 74(3) and 83(3) of the Convention, article 15 does not prescribe any obligation 'pending delimitation'. In cases where parties cannot reach an agreement on delimitation, an automatic rule applies, i.e., boundary is the median line equidistant from the base points. The automatic rule does not apply, however, where there is a historic title or other special circumstances requiring a different delimitation method. In such cases, states have to reach an agreement on delimitation. If there is a disagreement over existence of historic titles, states may resort to Part XV. The inclusion of the words 'historic bays or titles' in article 298(1)(a)(i) enable states to remove such disputes over territorial sea delimitation from compulsory procedures. In other words, article 15 of the LOSC solely focuses on delimitation of the territorial sea. In comparison, articles 74 and 83 of the LOSC are not only concerned with boundary delimitations. Paragraph 2 prescribes a procedural obligation to submit the delimitation to procedures provided for in Part XV of the LOSC.[15] Paragraph 3 prescribes obligations of restraint and cooperation in disputed maritime areas where parties are yet to agree on a boundary. These obligations are not about sea boundary delimitations, rather about special obligations placed on coastal states pending delimitation.[16] In short, the language in article 298 of the LOSC is strictly focused on delimitation, by way of qualifying the reference to articles 15, 74 and 83 with 'sea boundary delimitations' and 'involving historic bays or titles'. Therefore, subparagraphs of articles 74 and 83 that do not deal with 'boundary delimitation' must be within the jurisdictional scope of Part XV compulsory procedures.

A counter argument to this is that delimitation articles are a whole, and sub-paragraphs 3 are integral part of delimitation.[17] One cannot doubt or refute that during negotiations "the question of the legal principles of delimitation and the issue of interim measures pending a final delimitation were interrelated" in other words, they were agreed as a

[14] Article 298(1)(a)(i) of the LOSC.
[15] Article 74(2) and 83(2) of the LOSC.
[16] Beckman and Sim (n 9) 247.
[17] Liao (n 8) 312-313. For more detailed consideration of this counter argument see, Sim (n 9) 246.

'package' by the drafters.[18] However, it does not follow that because they were negotiated and agreed upon as part of a package deal, subparagraph 3 are excluded from compulsory procedures, especially given the specific context and wording of article 298(1)(a)(i) of the LOSC. Even from a teleological perspective, the subparagraph 3 serves a distinct purpose then the rest of the paragraphs in articles 74 and 83 of the LOSC. While the rest of the paragraphs deal with the obligations to negotiate a maritime boundary delimitation agreement and resort to compulsory procedures entailing binding decisions if no agreement can be reached, – subject to 298 of the LOSC – the obligations under subparagraphs 3 serve a different purpose.[19] A dispute about managing disputed maritime area pending delimitation pursuant to subparagraphs 3 is a different issue than that of delimitation. This begs the following question: can disputes concerning obligations pending delimitation be separated from their overall context, i.e., maritime boundary dispute, for the purposes of arbitration or adjudication?

2.1.2 Separation of disputes: obligations pending delimitation and maritime delimitation

The answer to the question whether a maritime delimitation dispute and a dispute concerning obligations under articles 74(3) and 83(3) of the LOSC can be separated is not available in the text of the LOSC. However, the submissions of states and the practice of courts and tribunals are helpful in this regard. To date, claims concerning obligations incumbent on states pending delimitation have only been considered as part of a more general dispute concerning boundary delimitation by international courts and tribunals.[20] Given this circumstance, a parallel can be drawn with *South China Sea Arbitration* in which the Tribunal had to consider the scope of the exception in article 298 of the LOSC.

In this case, Philippines made a number of submissions to the Arbitral Tribunal, which were carefully drafted to raise no issues concerning maritime delimitation given

[18] David Anderson and Youri van Logchem, 'Rights and Obligations in Areas of Overlapping Maritime Claims' in Jayakumar, Koh, and Beckman (eds), *The South China Sea Disputes and Law of the Sea* (Edward Elgar, 2014) 200.
[19] For a discussion on the purpose of articles 74(3) and 83(3) of the LOSC, see Chapters III and IV.
[20] *Guyana v. Suriname; Ghana v. Côte d'Ivoire; Somalia v. Kenya.*

China's declaration pursuant to article 298(1)(a)(i) of the LOSC.[21] While neither formally appearing nor participating in the proceedings before the Arbitral Tribunal, China published a 'Position Paper' outlining China's argument for why the Tribunal lack of jurisdiction.[22] The Chinese objection to the Tribunal's jurisdiction rested on three arguments: the real dispute concerns territorial sovereignty over maritime features, parties agreed to settle their relevant disputes through negotiation and, lastly, even if tribunal considered that subject-matter of the dispute concerned interpretation or application of the LOSC, the subject-matter falls within the scope of China's declaration excluding maritime delimitation from compulsory procedures pursuant to article 298(1)(a)(i) of the LOSC.[23]

The Tribunal's decision on whether the submissions presented by Philippines, those relating to status of maritime features, 'relate to sea boundary delimitations' excluded by China's declaration pursuant to article 298 of the LOSC is relevant for the question of separability raised in this section. The Arbitral Tribunal held that disputes relating to the status of certain maritime feature did not fall under China's declaration under article 298 of the LOSC.[24] According to the Tribunal:

> It does not follow, however, that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself.[25]

After this general remark the Tribunal considered that one of "the first matters" addressed in maritime delimitation is usually "fixing [of] the extent of parties' entitlements" to identify the area of overlap. However, the Tribunal considered that "a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements

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[21] *South China Sea Arbitration Award on Jurisdiction and Admissibility*, para 101.
[22] *South China Sea Arbitration Award on Jurisdiction and Admissibility,* para 14; Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (dated 7 December 2014) (hereinafter 'China's Position Paper') available online at: https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201412/t20141207_679387.html
[23] Ibid.
[24] *South China Sea Arbitration Award on Jurisdiction and Admissibility*, para 155-7.
[25] Ibid, para 155.

of the parties overlap".[26] Put differently, the Tribunal highlighted the separability of matters of entitlement from actual exercise of delimitation by international courts and tribunals. In the words of the Tribunal, "the Philippines has challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea. This is not a dispute over maritime boundaries".[27] As such, the Tribunal went on to decide the issues raised by the Philippines without delimiting the maritime boundary. While the subject matter of issues raised in *South China Sea Arbitration* were different, certain conclusions can be drawn, by analogy, from the logic of the Tribunal.

First, even if obligations incumbent on coastal states pending delimitation were accepted as issues to be considered in the actual exercise of boundary delimitation (the present author disagrees with such characterisation), the logic of the Tribunal suggests that a court or tribunal could decide on the disputes concerning the obligations without delimiting the maritime boundary. Second, obligations of states in disputed maritime areas are an independent issue from the act of maritime boundary delimitation. This can be deduced from the practice of international courts and tribunals that dealt with such disputes as part of a general application for maritime boundary delimitation. In three cases where both issues of maritime delimitation and obligations incumbent on states pending delimitation were raised, courts and tribunals considered disputes over obligations found in articles in 74(3) and 83(3) of the LOSC independently of maritime delimitation exercise.[28] Such disputes were not considered in the 'course of maritime delimitation' separately to the delimitation exercise, meaning in a separate part of the decision. Given that even a dispute over an issue which may form part of the maritime delimitation process, i.e., identification of entitlement/status of features, can be considered to be a distinct dispute to maritime delimitation and hence subject to compulsory procedures in Part XV of the LOSC, there should be little doubt over separability of disputes under paragraphs 3 from 'sea boundary delimitations' for the purposes of arbitration and adjudication pursuant to the LOSC.

[26] *South China Sea Arbitration Award on Jurisdiction and Admissibility,* para 156.
[27] Ibid, para 157.
[28] *Guyana v. Suriname*, para 453; *Ghana v. Côte d'Ivoire* para 541; *Somalia v. Kenya* para 198.

2.1.3 Timor-Leste/Australia Conciliation[29]

While no international court or tribunal directly pronounced whether disputes concerning interpretation and application of articles 74(3) and 83(3) of the LOSC are within the scope of the exception in article 298(1)(a)(i) of the LOSC, the Timor Sea Conciliation Commission had to address this issue indirectly as disagreement emerged between states during the hearings on competence.[30] Australia objected to Timor-Leste's request regarding 'transitional arrangements', arguing that those issues do not fall under the Commission's competence because those issues do not concern matters in article 298 of the LOSC.[31] The converse reading of the Australia's argument suggests that Australia interprets articles 74(3) and 83(3) as not being within the scope of the optional exception. This is converse argument suggests that only matters removed from the compulsory jurisdiction under Part XV may be submitted to compulsory conciliation under article 298(1)(a)(i) of the LOSC. In other words, those issues (article 74(3) and 83(3)) cannot be submitted to compulsory conciliation because this procedure is only for disputes excluded by article 298(1)(a)(i) of the LOSC.

In the opening session held on 26 August 2016, Timor-Leste specified the issues for the Commission with which she requested assistance:

> First, we hope that the Commission can assist the Parties to reach an agreement on the delimitation of permanent maritime boundaries…
>
> ….
>
> [A] second task for the Commission is to assist Australia and Timor-Leste to agree on appropriate transitional arrangements in the disputed maritime areas, to bring the parties from their current temporary arrangements to the full implementation of their newly agreed permanent maritime boundary.

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[29] See Chapter VII for further discussion.

[30] PCA, A conciliation commission constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, Decision on Australia's Objections to Competence (19 September 2016) (hereinafter '*Timor-Leste Australia Conciliation Decision on Competence*') para 93, available online at: https://pcacases.com/web/sendAttach/10052

[31] *Timor-Leste Australia Conciliation Decision on Competence*, para 94.

> Finally, a third task for the Commission, and one related to the issue of transitional arrangements, concerns the post-CMATS arrangements. With the expected termination of CMATS, and with it the Timor Sea Treaty, the parties will benefit from the assistance of the Commission in finding the optimal way to come to a mutual position on dissolving the joint institutions and arrangements found in those provisional arrangements, and moving on.[32]

In the same opening session, Australia objected that the second and third tasks "are not only outside the notification by Timor-Leste which commenced the proceedings, they are also on any view outside article 298 of UNCLOS, because they do not concern the matters in that article".[33] The Commission responded by reminding that the subject-matter referred in article 298(1)(a)(i) concerns "interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations"[34] and further noting that:

> It is apparent from an examination of these articles of the Convention that they address not only the actual delimitation of the sea boundary between States with opposite or adjacent coasts, but also the question of the transitional period pending a final delimitation and the *provisional arrangements* of a practical nature that the Parties are called on to apply pending delimitation. The Commission does not, therefore, see that Timor-Leste's request that the Commission also consider *transitional arrangements*, or the *arrangements that the Parties may enter into following the termination of CMATS*, lies outside the scope of Articles 74 and 83 or, correspondingly, of Article 298(1)(a)(i).[35]

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[32] Opening Session in Timor Sea Australia Conciliation, 29 August 2016, at p. 48-49, available online at: https://pcacases.com/web/sendAttach/1889.
[33] Opening Session in Timor Sea Australia Conciliation (n 32) at p. 70.
[34] *Timor-Leste Australia Conciliation Decision on Competence* para 95.
[35] Ibid, para 97 [emphasis added].

Therefore, the Commission ruled that it had competence to deal with Timor-Leste's second and third requests.[36] On a *contrario* reading of this statement, the Commission seems to be on the camp arguing that whole of articles 74 and 83 of the LOSC are captured by the exemption.[37] However, there are two reasons why the conciliation commission's rejection of Australia's objection should not be interpreted to support the argument that subparagraph 3 falls within the scope the optional exception under article 298(1)(a)(i) of the LOSC. The first reason is the distinction between 'provisional arrangements' on the one hand, and 'transitional arrangements' on the other.[38] Second, this exercise by the conciliation commission is better viewed as akin to an exercise to determine incidental competence once it is established that it has competence over the submission which concerns delimitation of the maritime boundary.

To begin with the first, the transitional arrangements that Timor-Leste requested the commission's assistance with, are different from the provisional arrangements of a practical nature envisaged by articles 74(3) and 83(3) of the LOSC. The key difference between transitional arrangements and provisional arrangements, in the context of this conciliation is that, in the former, there is an agreed maritime boundary (Timor-Leste requested transitional arrangements with the anticipation that the conciliation would successfully lead to agreement on maritime boundary, which it did), whereas in the latter, where provisional arrangements are concerned there is not an agreed maritime boundary. In terms of their functional difference, which is related to whether an agreed boundary exists or not, provisional arrangements aim to ensure that parties can exercise their rights or perform their obligations arising from the LOSC in the disputed maritime area while at the same time intending to ease tensions[39], whereas transitional arrangements, as also understood by Timor-Leste, are intended to facilitate implementation of the agreed maritime boundary "by bring[ing] the Parties from their current temporary [provisional] arrangements to the full implementation of

[36] This thesis returns to discussion of the arrangements recommended by the Commission in Chapter VII.
[37] According to Sim, "it would be an error to interpret the…statements…as an exclusion of these disputes from compulsory dispute settlement. The commission's statements must be read in the context of a *conciliation*." Sim (n 9) 250.
[38] Jianjun Gao, The Timor Sea Conciliation (Timor-Leste v. Australia): A Note on the Commission's Decision on Competence (2018) 49 *Ocean Development & International La*w 208, 220.
[39] See as discussed in Chapter IV.

their newly agreed permanent maritime boundary," and also to bring the already existing temporary (provisional) arrangements[40] between the parties to an end by "mutually agreed steps".[41] The fact that there already existed (temporary) provisional arrangements between the parties, which made direct reference to articles 74(3) and 83(3) of the LOSC[42], makes it non-logical to construe Timor-Leste's request as 'provisional arrangements'. The transitional arrangements that the Commission eventually assisted the parties with were not 'provisional arrangements' pending delimitation pursuant to articles 74(3) and 83(3) of the LOSC. At best, the request was about provisional arrangements, but only in terms of how to end existing arrangements. This is reflected in the Report and Recommendations of the Commission, the transitional arrangements that the Commission assisted parties with intended to help move away or dissolve the actual 'provisional arrangements'. Therefore, one must exercise caution in interpreting the extract cited above as confirming the exclusion of articles 74(3) and 83(3) from the purview of binding procedures.

Second, in its own words, the Commission's mandate was to "comprehensively engage with the Parties to address the issues necessary to achieve an amicable and durable settlement".[43] As such, when the Commission concluded that it had competence to deal with the dispute concerning maritime delimitation, the request regarding transitional arrangements came under its incidental competence because they would help assist in the resolution of dispute relating to 'sea boundary delimitations'. Therefore, the Commission's opinion must be read "in the context of

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[40] '*TST*' and '*CMATS Treaty*'.
[41] Opening Session in Timor Sea Australia Conciliation (n 32) at p. 49.
[42] The preamble to the *CMATS Treaty* reads: "TAKING INTO ACCOUNT the United Nations Convention on the Law of the Sea …, in particular, Articles 74 and 83 which provide that the delimitation of the exclusive economic zone and continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law in order to achieve an equitable solution; FURTHER TAKING INTO ACCOUNT, in the absence of delimitation, the obligation for States to make every effort in a spirit of understanding and cooperation to enter into provisional arrangements of a practical nature which are without prejudice to the final determination"; also the Preamble to the *Timor Sea Treaty* is nearly identical, but Article 2(a) explicitly provides that "This treaty gives effect to international law as reflected in….under article 83 which requires States…to enter into provisional arrangements…This treaty is intended to adhere to such obligation.
[43] PCA, In the Matter of the Marine Boundary between Timor-Leste and Australia before a Conciliation Commission constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea, The Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, 9 May 2018, para 62 available at https://pcacases.com/web/view/132 (hereinafter 'TS Conciliation Report'), para 62.

asserting competence over Timor-Leste's request for conciliation".[44] Consequently, the Commission's exercise, establishing the scope of issues that it could deal with, is an issue of incidental competence. One must note, the scope of a conciliation commission's competence is subtly different from the scope of the optional exemption under article 298(1)(a)(i) of the LOSC. This thesis returns this issue, i.e., what is the scope of a conciliation commission's competence/mandate, in Chapter VII.

2.2 Suitability of disputes concerning articles 74(3) and 83(3) of the LOSC for arbitration and/or adjudication

In all three of the maritime delimitation cases that raised issues under articles 74(3) and 83(3) of the LOSC, the applicant states claimed the responsibility of the respondent for violations of the obligations to make every effort to enter into provisional arrangements and not to jeopardise or hamper.[45] The Tribunal in *Guyana v. Suriname* considered whether activities and actions of the two disputing states were in accordance with their obligations pending settlement of the maritime boundary. In doing so, the Tribunal also made important observations in relation to options that were available to disputing parties that could have ensured compliance with their obligations at the time when tensions were mounting between them. These observations reflect the Tribunal's understanding that judicial institutions have a role to play in the management of disputed maritime areas by engaging with disputes arising in the absence of maritime boundaries, even if they cannot deal with the dispute over delimitation per se.

Since there was an obvious dispute concerning the unilateral exploratory drilling in the disputed maritime area, given numerous diplomatic objections, both Guyana and Suriname were under an obligation to negotiate in good faith to resolve the issue by either entering into a provisional arrangement or another mutually agreeable

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[44] Sim (n 9) 250.

[45] For example, Guyana submission in its Memorial reads: "Suriname is internationally responsible for violating its obligations under the 1982 United Nations Convention on the Law of the Sea to make every effort to enter into provisional arrangements of a practical nature pending agreement on the delimitation of the continental shelf and exclusive economic zones of Guyana and that Suriname, and by jeopardising or hampering the reaching of the final agreement; and that Suriname is under an obligation to provide reparation, in a form and in an amount to be determined, for the injury caused by its internationally wrongful acts" *Memorial of Guyana,* Submissions, at p. 135, available online at: https://pcacases.com/web/sendAttach/904.

measure.[46] Both the principles and rules discussed earlier in this thesis reflect that this is the expected conduct from states. If negotiations failed, then any one of the parties, according to the Tribunal, could have invoked compulsory procedure under Part XV instead of letting the tense situation to build up by resorting to self-help.[47] In a way, the Tribunal answers the question regarding the suitability of disputes concerning articles 74(3) and 83(3) of the LOSC for compulsory dispute settlement[48] by encouraging the use of compulsory and binding procedures in Part XV when bilateral negotiations fail.

The Award of the Tribunal in *Guyana v. Suriname* illustrate that submission of a dispute concerning articles 74(3) and 83(3) of the LOSC can settle disagreements in relation to (i) interpretation of the obligation to enter into provisional arrangements and/or not to jeopardise or hamper and (ii) whether in the circumstances of a case, the actions of the parties comply with those obligations as well as what parties could do, to prevent further breach, until final agreement is reached.[49] The latter is particularly pressing and relevant given that parties are not applying to settle the maritime boundary delimitation dispute, but rather the dispute in relation to the obligations arising pending delimitation.

In this connection, another one of the Tribunal's dicta is important for the question regarding the role of courts and tribunals in managing disputed maritime areas. The Tribunal noted that resorting compulsory procedures under Part XV opens the possibility, in accordance with to Article 290 of the LOSC, to request provisional measures.[50]

This chapter now turns explore the provisional measures procedure, examining how and in what ways provisional measures contribute to the management of disputed maritime areas.

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[46] See the discussion in Chapter III section 3, and Chapter IV section 2.
[47] *Guyana v. Suriname,* para 482 and 484.
[48] Sim (n 9) 252-253; Natalie Klein, 'Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes' (2006) 21 *The International Journal of Marine and Coastal Law* 423, 452-453.
[49] These questions are influenced by the findings of the Tribunal in *Guyana v. Suriname,* paras 476-477.
[50] *Guyana v. Suriname,* para 484.

3 Obtaining a provisional measures order

After any one of the disputing parties institute proceedings, under Section 2 of Part XV pursuant to a written notification, depending on circumstances either before ITLOS, the ICJ, or an Annex VII Tribunal[51], a request can be submitted for provisional measures. Provisional measures can also be requested, not just under section 2 of Part XV but more broadly from international courts and tribunals. This section considers the function, procedural and substantive aspects of provisional measures proceedings. In doing so, this section refers to the only two provisional measures orders requested from the ICJ and ITLOS in relation to disputed maritime areas, in cases between Greece and Turkey[52], and Ghana and Côte d'Ivoire.[53] By considering these cases, this section demonstrates how tests or conditions for ordering provisional measures are applied in practice in the context of disputed maritime areas. Lessons of these proceedings coupled with the evidence from other inter-state disputes, where parties received a provisional measures order, suggests that provisional measures can positively contribute, whether or not an order is granted, to the management of disputed maritime areas.

The power of international courts and tribunals to order provisional measures of protection comes within the scope of their 'incidental jurisdiction' provided for in their constituent instruments, for example, article 41 of the ICJ Statute or article 25 of the Statute of ITLOS.[54] Incidental jurisdiction refers to the power of courts and tribunals to take all necessary measures or decisions for the conduct of proceedings of a case and its parties.[55] Provisional measures, as part of the international system of judicial proceedings, are traditionally concerned with the preservation of the rights of each

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[51] Article 287 of the LOSC.
[52] *Aegean Sea Continental Shelf* (Provisional Measures).
[53] *Ghana v. Côte d'Ivoire* (Provisional Measures).
[54] The substantive law regarding the granting of provisional measures by ITLOS or other dispute settlement bodies established under Part XV and Part XI, Section 5 of UNCLOS is set out in Article 290 of the LOSC. Although the main characteristics of Article 290 is based on the Article 41 of ICJ Statute, it introduced changes that take into account the peculiarities of the jurisdiction of courts and tribunal seized in accordance with the Convention in addition to clarifying and improving the legal regime of provisional measures under the ICJ Statute.
[55] Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for Law of the Sea* (Oxford University Press 2004) 9.

party *vis-à-vis* the other (which are subject of dispute), pending the settlement of the case. Due to the exceptional nature of the power to order provisional measures, courts and tribunals follow strict tests while considering whether circumstances provide a sufficient basis for ordering provisional measures. This is because a court or tribunal is being asked to make an order before it has made a decision on the merits, and indeed, before it has even confirmed that it has jurisdiction. When an application is made by the parties requesting prescription of provisional measures, it is a matter for a court or tribunal to consider what measures to prescribe in each case.[56]

Provisional measures are prescribed with the purpose of protecting the object of proceedings in question and integrity of the final judgment on the merits.[57] In other words, provisional measures orders are intended to preserve the situation as it is upon the initiation of the proceedings, if, there is a risk of frustration of the final judgment by either, or both, of the parties to the dispute.[58] According to the ICJ Statute, the Court may order provisional measures "if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".[59] ITLOS and other courts and tribunals with jurisdiction under article 287 of the LOSC, have the power to prescribe provisional measures by the virtue of article 290 of the LOSC, if:

> a dispute has been duly submitted to court or tribunal which considers that *prima facie* it has jurisdiction under this Part [Part XV, Settlement of Disputes] or Part XI, Section 5 [The Area, Settlements of Disputes and Advisory Opinions], the court or tribunal may prescribe any provisional

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[56] Article 290(3) of the LOSC.
[57] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal),* Provisional Measures, Order of 2 March 1990, ICJ Reports 1990, p. 64, Dissenting Opinion of Judge Thierry, p.79, 80.
[58] While the overriding issue is ensuring party's rights are protected pending the decision on the merits. Another objective of provisional measures, frequently reiterated in the case law of ICJ is the prevention of the aggravation of the dispute. The ICJ held that if it considers that circumstances so require, independently of the request of the parties, the Court may indicate additional measures to prevent the aggravation or extension of the dispute, for example in the *Case Concerning the Frontier Dispute (Bukarina Faso v Mali)*, Provisional Measures, Order of 10 January 1986, ICJ Reports 1986, p. 3, para 18; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Provisional Measures, Order of 10 May 1984, ICJ Reports 1984, p. 169; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, p. 325.
[59] The ICJ Statute, Article 41.

> measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.[60]

Article 290 of the LOSC, modelled on the ICJ's practice on provisional measures, affords protection to the rights of all parties to a dispute, although there are noteworthy improvements and additions under article 290 of the LOSC. One such improvement can be seen in the language used in the LOSC. A court or tribunal, pursuant to article 290 of the LOSC 'prescribes' rather than 'indicates' provisional measures. The significance of the word choice reflects the wish of the drafters of the LOSC to make clear that provisional measures are of a binding character because, at the time, there were considerable ambiguity on this matter in relation to the ICJ's practice of ordering provisional measures.[61] The ICJ also settled that debate in the *LaGrand* case[62], by providing that its provisional measures orders are binding. The binding nature of the provisional measures is stressed expressly in the LOSC whereby parties are explicitly required to "comply promptly with any provisional measures prescribed under this article" pursuant to article 290(6) of the LOSC.[63]

Another important distinction and addition in the substantive law is that a court or tribunal seized pursuant to Part XV, of the LOSC and Part VIII of the UN Fish Stocks Agreement (UNFSA) have power to prescribe provisional measures, respectively, for prevention of serious harm to the marine environment[64] and fish stocks.[65] The additional objective of prevention of serious harm to the marine environment introduced by article 290(1) of the LOSC has not yet been solely relied on for the prescription of provisional measures. Nevertheless, ITLOS has recognised that it has such a power in the *Southern Bluefin Tuna Cases, MOX Plant Case,* and considered

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[60] Article 290(1) of the LOSC.
[61] Tullio Treves, Article 290, MN 4 in Alexander Proelss (ed) *UNCLOS: A Commentary* (Beck, Hart, and Nomos, 2017).
[62] *LaGrand (Germany v. United States of America),* Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, p. 9.
[63] Article 290(6) of the LOSC.
[64] Article 290(1) of the LOSC.
[65] Article 31(2) of the UNFSA.

this objective in *Ghana v. Côte d'Ivoire* while ordering provisional measures to the parties.[66]

Finally, article 290 of the LOSC introduces "important changes to prescription of provisional measures in order to accommodate the peculiarities of the jurisdiction of courts and tribunals seized in accordance with UNCLOS".[67] Under Article 290(5) of the LOSC, parties to a dispute can request a provisional measures order from a standing court or tribunal pending the constitution of the arbitral tribunal to which the main dispute has been submitted. This is significant for disputed maritime areas, particularly in tense situations such as the threat of use of force between Guyana and Suriname. In such cases, ITLOS is given a compulsory residual jurisdiction to respond to an urgent request for provisional measures.

It is worth here two address the relationship between provisional measures discussed in this chapter and provisional arrangements discussed in Chapter III. Both offer temporary means of addressing challenges associated with disputed maritime areas, contributing to promotion of stability in the relations of disputing states and the disputed maritime area. Both provisional measures and provisional arrangements the objective is to offer a means of preserving and protecting the rights and interests of both parties pending the final resolution of the dispute. As shown above in this chapter, the objective of provisional measures is to preserve the rights of each party to a dispute until the court or tribunal renders the final judgment. Similarly, the policy of providing for provisional arrangements rest on protecting potential rights and interests of each party until they conclude a delimitation agreement. However, similarities are limited to their aim and temporal scope – pending agreement/final judgment. These regimes have separate and independent origins. Simply put, they are different legal tools belonging to separate regimes within the international legal framework. As such it is important to acknowledge their differences. Notably, there are temporal and contextual differences that are worthy of notice. They aim to do different things in different times. For instance, obligation to enter into provisional arrangements under

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[66] *Southern Bluefin Tuna Cases* (Provisional Measures) para 67; *MOX Plant (Ireland v. United Kingdom),* Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, para 64; *Ghana v. Côte d'Ivoire (Provisional Measures),* para 101.
[67] Treves (n 61) MN 2.

74(3) and 83(3) of the LOSC apply in the time frame that there is no agreement reached between the parties, aiming to promote peace, stability and orderly use/management of the disputed maritime area (for more on the objectives of provisional arrangements, see Chapter III). On the other hand, provisional measures are an exceptional procedure during international proceedings, so parties apply for the resolution of their disputed maritime boundary. Although there may be exceptions, in general, when a provisional measures order is requested, the act or activity of infringement complained of is either *happening* or *imminent to happen*.[68] They also operate in different contexts in the sense that in dealing with dispute in provisional measures phase, a court or tribunal is considering whether certain conditions are satisfied for granting of binding provisional measures. However, the two regimes are interconnected because failure to cooperate and agree on provisional arrangements, and in particular if unilateral actions are being undertaken, may mean that disputing state(s) may resort to dispute settlement under Part XV of the LOSC, and in particular request provisional measures, protect its rights and interests, as recognised by the Arbitral Tribunal in *Guyana v. Suriname*.

3.1 The tests for the prescription of provisional measures

3.1.1 Prima facie jurisdiction

The practice of international courts and tribunals have established several requirements that must be met for granting a provisional measures order. The jurisdictional requirement for granting of an order of provisional measures had been a source of discussion.[69] It is now established that a court or tribunal does not need to satisfy itself conclusively that it has jurisdiction on the merits of the case, but, if the absence of jurisdiction on the merits is manifest.[70] According to the ICJ in the *Nuclear Test Cases*:

[68] See the discussion about furthering further deterioration of bluefin tuna stock in *Southern Bluefin Tuna* (Provisional Measures), paras 77-80.
[69] See for example, JG Merrills, 'Interim Measures of Protection and The Substantive Jurisdiction of The International Court' (1977) 36 *The Cambridge Law Journal,* 86.
[70] *Fisheries Jurisdiction Cases (United Kingdom v Iceland),* para 15.

> Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.[71]

Article 290(1) of the LOSC reflects the established jurisprudence of the ICJ. It provides that the court or tribunal to which the request has been submitted must consider that it has *prima facie* jurisdiction under the Convention. ITLOS, in its practice, determines its *prima facie* jurisdiction by considering whether the provisions invoked by the applicant "appear to afford a basis on which the jurisdiction of the Tribunal might be founded".[72] In the *M/V 'Saiga' Case*, the jurisdictional basis was article 297(1) of the LOSC as the case concerned the contravention by the coastal State of the rights and freedoms of other States in the EEZ.[73] Finding of *prima facie* jurisdiction during the provisional measures stage does not guarantee, in the merits, substantial jurisdiction.[74] It is also noteworthy that in proceedings before ITLOS, the Tribunal gives serious attention to provisions invoked by respondent States to exclude the existence of *prima facie* jurisdiction.[75]

In the two cases concerning disputed maritime areas, the precondition of *prima face* jurisdiction has been satisfied easily. In the *Aegean Sea Continental Shelf*[76]*,* Greece submitted its dispute concerning the delimitation of the continental shelf with Turkey to the International Court of Justice on 10 August 1976.[77] On the same day, Greece filed a request for provisional measures. Greece complained that between 6 and 8 August 1976 the MTA Sismik I (Turkish seismic research vessel) engaged in seismic

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[71] *Nuclear Test Cases (Australia v France),* para 13 and *(New Zealand v France)* para 18. This formula was repeated in later cases of the ICJ, *Military and Paramilitary activities in and against Nicaragua* (Provisional Measures)*,* para 24; *LaGrand (Germany v United States of America)*, para 13.
[72] *The M/V 'Saiga'*, paras 29-30.
[73] Ibid.
[74] *M/V 'Louisa' Case (Saint Vincent and the Grenadines v. Kingdom of Spain),* Provisional Measures, Order of 23 December 2010, ITLOS Reports (2008–2010) p. 58, para 80; *Southern Bluefin Tuna Case* (Provisional Measures)*.*
[75] See the discussion in the *M/V 'Louisa' Case,* paras 55-65 and the Dissenting Opinions of Judge Wolfrum, Judge Treves and Judge Golitzyn.
[76] *Aegean Sea Continental Shelf* (Provisional Measures).
[77] It is important to bear in mind that the respondent State, Turkey, did not appear before the Court and objected to the Court's jurisdiction on the matter.

exploration of the areas of the Aegean Sea claimed by Greece, infringing the exclusive sovereign rights of Greece to explore and exploit its continental shelf.[78] Greece asked the Court to order provisional measures: (i) for the cession of exploration and scientific research activities within the continental shelf areas and islands in order to preserve its rights and; (ii) prevention of aggravation of the dispute by military measures or any other action.[79] The court first noted Turkey's objections to its jurisdiction over the main dispute submitted by Greece.[80] However, the Court decided that at this preliminary stage it did not need to decide on the disagreement between the states regarding the question of its jurisdiction pursuant to the application of the General Act of 1928.[81] Nothing that article 41 of the Statute grants the Court to order provisional measures to preserve the respective rights of the parties pending the decision on the merits.[82] The Court concluded that this power relates to "the preservation of the rights which are invoked in Greece's Application".[83]

Nearly four decades after the *Aegean Sea Continental Shelf,* a Special Chamber of ITLOS considered a similar request for provisional measures in *Ghana v. Côte d'Ivoire.*[84] The dispute concerning maritime boundaries between Ghana and Côte d'Ivoire crystallised during the period in which Ghana announced major oil discoveries in the disputed maritime area. Having authorised a consortium of companies for development of oilfields between 2007 and 2010, Ghana has undertaken drilling including in the disputed maritime area where the parties had not reached a maritime boundary delimitation agreement in the face of Côte d'Ivoire's repeated objections. In order to settle their boundary dispute, the parties established 'the Joint Ivorian-Ghanaian Commission on Delimitation of the Maritime Boundary' in 2008. After failing to reach an agreement after 10 meetings, Ghana has notified Côte d'Ivoire that arbitration under Annex VII have been initiated as of 22 September 2014 pursuant to Part XV of the LOSC.[85] Parties then entered into a special agreement referring the

[78] *Aegean Sea Continental Shelf Case* (Provisional Measures), para 16.
[79] Ibid, para 2.
[80] *Aegean Sea Continental Shelf* (Provisional Measures) para 19.
[81] Ibid, para 21. As mentioned earlier the Court later held that it did not have jurisdiction.
[82] *Aegean Sea Continental Shelf* (Provisional Measures) para 22.
[83] Ibid.
[84] *Ghana v. Côte d'Ivoire* (Provisional Measures).
[85] Ibid, Letter from Ghana, Annex 9.

dispute to a Special Chamber of ITLOS.[86] Côte d'Ivoire submitted a request on 27 February 2015 for the prescription of provisional measures under article 290(1) of the LOSC.[87] The Special Chamber first considered whether it had *prima facie* jurisdiction over the dispute and decided positively on the matter by the virtue of Special Agreement concluded by the parties.[88]

However, one must consider a circumstance where a submission is made pursuant to article 290 of the LOSC but one of the parties has declared that disputes concerning sea boundary delimitation are removed from the compulsory jurisdiction of courts and tribunals under Part XV. The following question arises: how far is ITLOS, or any other forum with jurisdiction pursuant to Part XV, is likely to go in determining whether there is a *prima facie* jurisdiction given the existence of a declaration under article 298(1)(a)(i) of the LOSC? This is an open question and interesting question. One may argue that existence of a declaration suggests that absence of jurisdiction on the merits is manifest and therefore, ITLOS would probably not go far. This would be especially the case if the dispute on the merits concerns maritime boundary delimitation.

3.1.2 Plausibility of rights

The prescription of provisional measures requires that the right to be protected must be plausible. The plausibility test is a recent development in the jurisprudence – first discussed in the *Passage through the Great Belt*.[89] It was in the *Belgium v. Senegal* case[90] that the ICJ expressly established the requirement of plausible rights for provisional measures.[91] The test has been reaffirmed in subsequent cases before the

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[86] Notification of Special Agreement between Ghana and Cote d'Ivoire dated 3 December 2014, available online at ITLOS website: https://www.itlos.org/en/main/cases/list-of-cases/case-no-23/
[87] Request for the prescription of provisional measures submitted by the Republic of Côte d'Ivoire under Article 290, paragraph 1, of the UNCLOS, 27 February 2015, para 54, available ITLOS website at: https://www.itlos.org/en/main/cases/list-of-cases/case-no-23/case-no-23-provisional-measures/
[88] *Ghana v. Côte d'Ivoire* (Provisional Measures), paras 34-38.
[89] *Passage through the Great Belt* (Provisional Measures), paras 21-22 and Judge Shahabuddeen devoted his Separate Opinion at p. 35, to the Danish argument that applicant had to demonstrate "the possibility of the existence of the right" claimed.
[90] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* Provisional Measures, Order of 28 May 2009, ICJ Reports 2009, p. 139.
[91] Ibid, para 57.

ICJ.[92] With regards to the law of the sea disputes, the plausibility test was first applied by the Special Chamber of ITLOS in the *Ghana v. Côte d'Ivoire*[93] and later in the *"Enrica Lexie"* case.[94] The requirement is that a court or tribunal, at this stage of proceedings, must be satisfied that the rights sought to be protected by a provisional measures order are, at the least, plausible.[95]

This is not a very demanding test – which is due to the nature of provisional measures proceedings – and as such, both Judges[96] and academics[97] have raised some concerns over the vagueness and perceived lowering of threshold for provisional measures. In theory, it seems to be prudent to ensure rights are plausible and connected to the merits of the case. Such a requirement intends to safeguard against abuse of process and relates to judicial economy despite challenges with setting an appropriate threshold. The debate ensues about the standard of the plausibility test: misgivings arise from the dangers of a low standard to satisfy the test, and on the other hand, a higher standard would risk prejudgment, as states may need to cover issues relating to merits.

For instance, Judge Korma notes, "the most problematic aspect of the plausibility standard is its vagueness, giving the impression that the threshold for the indication of provisional measures has been lowered".[98] According to Judge Korma, in the *Certain Activities* case, the "unreliable legal standard" of plausibility "may inadvertently offer

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[92] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* Provisional Measures, Order of 28 March 2011, ICJ Reports 2011, p.6, para 53; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* Provisional Measures, Order of 22 November 2013, ICJ Reports 2013, p.398, para 15; *Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 14 June 2019, ICJ Reports 2019, p. 361, para 18.
[93] *Ghana v. Côte d'Ivore* (Provisional Measures) paras 57-58.
[94] *The "Enrica Lexie" Incident (Italy v. India)* (Provisional Measures) Order of 24 August 2015, ITLOS Reports 2015, p. 197, paras 83-84.
[95] *Certain Activities Carried out by Nicaragua in the Border Area* (Provisional Measures) para 57.
[96] See, Separate Opinion of Judge Koroma and Separate Opinion of Judge Dugard in *Certain Activities* (Provisional Measures), para 7-8 and para 3 respectively.
[97] JG Merrills, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice' (1995) 44 *The International and Comparative Law Quarterly* 90, 115–116; Yoshifumi Tanaka, 'Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the Ghana/Côte d'Ivoire Order of 25 April 2015 before the Special Chamber of ITLOS' (2015) 46 *Ocean Development & International Law* 315, 318–320.
[98] Separate Opinion of Judge Koroma in *Certain Activities* (Provisional Measures), para 7-8; Separate Opinion of Judge Dugard in *Certain Activities* (Provisional Measures) para 3.

parties an opportunity to submit specious claims, which at a superficial glance, may appear credible but could mislead the Court to indicate provisional measures".[99] In the same case, Judge Sepúlveda-Amor expressed the concern that the plausibility requirement may cause parties to unnecessarily address the merits of the dispute at this early stage of the proceedings.[100] It has become clear that the standard for the plausibility test can influence the decision of an international court or tribunal to prescribe or order provisional measures in a given case. In the *Ukraine v. Russia* case, the ICJ refused, in relation to Ukraine's request regarding its rights under the International Convention for the Suppression of the Financing of Terrorism, to order provisional measures as evidence before the Court did not establish the plausibility of the alleged rights.[101] In his Separate Opinion Judge Owada challenged the view of the Court stating that "the standard of plausibility is, and must be, fairly low. The question to be asked should be whether an asserted right is "possible" or "arguable" to justify the exercise of the Court's exceptional power.[102] Nevertheless, the plausibility test has, despite absence of a precise standard, seemingly been established both in the practice of the ICJ and ITLOS.

The threshold for plausibility should not be set too high. While it is an important test for reasons mentioned above, it is not the main condition for ordering provisional measures. If all the other tests are satisfied, importantly if there is an imminent risk of irreparable prejudice, the courts and tribunals should not be very demanding on the plausibility. This is because a demanding test on this matter risks pushing parties to present issues and arguments relating to the merits.

In a maritime boundary delimitation case, or case concerning obligations incumbent upon states pending delimitation, proving plausibility of rights would not be difficult as parties are opposite or adjacent states with overlapping maritime entitlements. As

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[99] Ibid, para 8.
[100] Separate Opinion of Judge Sepulveda-Amor in the *Certain Activities (Costa Rica v. Nicaragua)* (Provisional Measures) case, at p. 38, para 15; See also Separate Opinion of Judge Dugard in *Certain Activities* (Provisional Measures) para 3.
[101] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017, ICJ Reports 2017, p. 104, paras 74-76.
[102] Separate Opinion of Judge Owada in *Ukraine v. Russia,* at p. 142, para 20.

evidenced in *Ghana v. Côte d'Ivoire*, the Chamber was easily satisfied with the plausibility of rights claimed by Côte d'Ivoire.[103] Rights invoked were those according sovereignty to the coastal State over territorial sea extending to the "bed and subsoil" under article 2 of the LOSC; sovereign rights over the continental shelf including all rights connected for the purposes of exploration and exploitation of the natural resources of the seabed and subsoil under article 56(1) and 77(1) of the LOSC.[104]

3.1.3 Imminent risk of irreparable prejudice

Another requirement for the granting of provisional measures is the urgency of the situation.[105] Urgency is neither explicitly required by the article 41 of ICJ Statute, nor article 290(1) of the LOSC.[106] There are two different types of urgency, procedural[107] and substantive. As a prerequisite we are concerned with substantive urgency. When provisional measures are requested under paragraph 5, the substantive test of urgency is stricter; there is no 'urgency' within the meaning of paragraph 5 if the measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted.[108]

The presumption that the issuance of provisional measures requires urgency is reflected in the rules[109] and jurisprudence[110] of both the ICJ and ITLOS. The requesting State must establish existence of such urgency for prescription of

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[103] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 62.
[104] Ibid para 61.
[105] *Land and Maritime Boundary between Cameroon and Nigeria*, Provisional Measures, Order of 15 March 1996, ICJ Reports 1996, p. 13, para 35.
[106] But article 290(5) of the LOSC, dealing with provisional measures to be ordered pending the establishment of an arbitral tribunal, does mention urgency.
[107] It is worth making a few remarks on procedural urgency. Article 74(2) of the ICJ Rules mention that "the Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency". Put differently provisional measures proceedings take precedence over any other proceedings before the ICJ.
[108] *Southern Bluefin Tuna* (Provisional Measures) Sep. Op. of Judge Treves, p. 316, paras 3-4.
[109] See ICJ Rules, Articles 74(2) and 54(2); ITLOS Rules Articles 89(4) and 90; and Article 11(2) of The Resolution on the International Judicial Practice of the Tribunal (adopted on 31 October 1997), 27 April 2005 ITLOS/10 available at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos.10.E.27.04.05.pdf
[110] *Passage through the Great Belt (Finland v. Denmark),* Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 12, para 23; *Land and Maritime Boundary between Cameroon and Nigeria,* para 35; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom),* Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p. 3; *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, p. 113, paras 62 and 73; and *Côte d'Ivoire v. Ghana* (Provisional Measures), para 42.

measures. There may be an event of extreme urgency and the Court may examine *proprio motu* without holding oral hearings whether circumstances require the indication of provisional measures.[111]

The underlying presumption of rules on provisional measures is that provisional measures shall be invoked only in cases of urgency.[112] The ICJ has reiterated that provisional measures are only justified if there is urgency in the sense that action prejudicial to the rights of either party to the dispute is 'imminent' before the final decision is rendered.[113] Rosenne emphasises that urgency is implicit in the requirement that "in the circumstances" immediate action is necessary "to protect the rights" which cannot wait until "the final decision" in the case.[114] The inherency of establishing the existence of urgency in all provisional measures orders is also endorsed by the Special Chamber of ITLOS in *Ghana v. Cote d'Ivoire*[115] and by the Arbitral Tribunal in the "*Enrica Lexie"* case[116], where the Tribunal stated that:

> [It] is mindful of the international jurisprudence developed by courts and tribunals on this question, which supports the view that urgency is an important element in considering a request for provisional measures.[117]

The Tribunal added further that "a showing of urgency in some form is inherent in provisional measures proceedings" as "urgency is linked to the criterion of preservation of the respective rights of the parties to the dispute in order to avert a *real* and *imminent risk* that irreparable prejudice may be caused to the rights at issue, pending the final decision on the merits".[118] The test of irreparability forms the core of provisional measures in the sense that if there is no risk of irreparable harm, damage

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[111] *LaGrand* (Provisional Measures) para 21.
[112] ICJ, Rules of Court, Article 74(2).
[113] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Provisional Measures, Order of 1 July 2000, ICJ Reports 2000, p. 11, para 43; *Pulp Mills* (Provisional Measures) para 62 and 74; *Military and Paramilitary Activities in and against Nicaragua* (Provisional Measures), para 25.
[114] Rosenne (n 55) 135.
[115] *Ghana v. Côte d'Ivoire* (Provisional Measures) paras 41-43.
[116] PCA, *The 'Enrica Lexie' Incident Arbitration (Italy v. India),* Provisional Measures, Order of 29 April 2016, available at: www.pca-cpa.org.
[117] Ibid, para 85.
[118] *The 'Enrica Lexie'* (Provisional Measures), para 89 [emphasis added].

or injury to the rights of either party,[119] the question of urgency becomes irrelevant. That being said, it has been reiterated by the ICJ in the *Pulp Mills* that the test is applied to the evidence presented at the time and nothing prevents a party from re-applying, at a future date, for an order of provisional measures should new evidence come to light.[120] As a rule of thumb, the test of irreparable prejudice is satisfied if the final decision would not be able to remedy the imminent and real risk of harm, injury or prejudice to the right in question, thereby, necessitating prescription of provisional measures to preserve the rights *pendente lite.* In some circumstances, such as in the *Passage Through the Great Belt*[121] and *Pulp Mills* cases*,* provisional measures may not be ordered because activities can be reversed at the merits stage, if acts complained of are found to be in breach of a legal right.[122] The ICJ held in the *Passage Through the Great Belt* that construction activities "must not be continued or must be modified or dismantled" if it is established on the merits that they breach a legal right.[123]

The jurisprudence indicates a certain degree of flexibility when applying the irreparable prejudice test to circumstances of each case. In the *Aegean Sea Continental Shelf* case, Greece claimed that Turkish seismic activities were in breach of its exclusive right of exploration and exclusive right to information over its continental shelf. According to the ICJ, if Greece's claims on the merits succeed, Turkey's seismic exploration may then be considered an infringement and a possible cause of prejudice to the exclusive rights of Greece in areas then found to appertain to Greece.[124] However, the Court did not think, "the possibility of such a prejudice to rights in issue before the Court does not, by itself, suffice to justify recourse to its exceptional power".[125] The condition is that the circumstances must "disclose the risk of an irreparable prejudice to rights in issue in the proceedings".[126] Moreover, the alleged

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[119] Various terms are used by international courts and tribunals, in the context of provisional measures, for the concept of "preservation of rights", see *M/V Saiga Case,* Separate Opinion of Judge Laing, para 27.
[120] *Pulp Mills* (Provisional Measures) para 74 and 86.
[121] *Passage Through the Great Belt* (Provisional Measures), para 31.
[122] *Pulp Mills* (Provisional Measures) para 78.
[123] *Passage Through the Great Belt* (Provisional Measures) para 31.
[124] *Aegean Sea Continental Shelf* (Provisional Measures) para 31.
[125] Ibid, para 32.
[126] Ibid.

breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of the continental shelf, the Court held, "is one that might be capable of reparation by appropriate means" if the Court finds that the area belongs to Greece on the merits.[127] In other words, the Court refused to order provisional measures, because it is convinced that activities of Turkey are 'reversible' similar to the logic in *Passage through the Great Belt* and *Pulp Mills*. As such, there was no imminent risk of irreparable prejudice to the rights claimed by Greece.[128]

In *Ghana v. Cote d'Ivoire,* the decision of the Special Chamber contains more details in relation to the test in comparison with the *Aegean Sea Continental Shelf.* Another aspect of the decision that stands out was the balancing act performed by the Special Chamber.[129] The Special Chamber considered that "the decision whether there exists imminent risk of irreparable prejudice can only be taken on a case-by-case basis in light of all relevant factors".[130] The question was whether Ghana's oil exploration and exploitation posed, a risk of irreparable prejudice to Cote d'Ivoire's claimed sovereign rights. After considering the circumstances of the case, decided that the exploration and exploitation activities of Ghana in the disputed maritime area "may cause irreparable prejudice to the sovereign and exclusive rights invoked by Côte d'Ivoire" before a decision on the merits is given by the Special Chamber and that the risk of such prejudice is imminent.[131]

First, the Chamber noted that any financial loss by Côte d'Ivoire of the revenues derived from oil production could be compensated in the future.[132] However, the Chamber decided a risk of irreparable prejudice exists when activities in the disputed area result in a "significant and permanent modification" of the physical characteristics of the continental shelf and where modification cannot be fully financially compensated.[133] In this connection, the Chamber opined that permanent modification

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[127] *Aegean Sea Continental Shelf* (Provisional Measures) para 32.
[128] Ibid*,* para 33.
[129] For further discussion see Section 3.2 below.
[130] *Ghana v. Côte d'Ivoire* (Provisional Measures) para 43.
[131] Ibid*,* para 96
[132] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 88
[133] Ibid, para 89.

of the seabed and subsoil would never be restored to the *status que ante* through any kind of compensation awarded.[134] As such, current circumstances may affect the rights of Cote d'Ivoire irreparably if Chamber were to find on the merits that all or any part of the area in dispute belongs to Côte d'Ivoire.[135]

Furthermore, the Chamber also ruled on Côte d'Ivoire's claim that information collection relating to the natural resources of the disputed area by Ghana poses a risk of irreparable prejudice to Côte d'Ivoire's rights.[136] The Chamber noted the assurance that the information "will be duly recorded, and Ghana will be in a position to provide that information to Côte d'Ivoire if ordered to do so at the conclusion of the case".[137] Despite this assurance, which was probably what the ICJ had in mind when it considered that this right could be remedied by appropriate means in the *Aegean Sea Continental Shelf*[138], the Chamber departed from the ICJ's earlier jurisprudence. For the Special Chamber, if Cote d'Ivoire's claim succeeded on the merits, the acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights of Côte d'Ivoire.[139] The Chamber did not seem to agree with the ICJ that such prejudice was capable of reparation or was in other words 'reversible'. The Chamber has decided based upon these considerations that the exploration and exploitation activities posed imminent risk of irreparable prejudice to the sovereign and exclusive rights invoked by Côte d'Ivoire pending a decision on the merits by the Chamber.[140]

In the context of disputed maritime areas, the imminent irreparable prejudice has been determined, in general, based on the nature of the resource related activity. The two cases in which the courts and tribunals have considered the test of imminent risk of irreparable prejudice concerned exercise of coastal state rights in relation to the continental shelf, exploration (in the case of Greece and Turkey) and exploitation (in the case of Ghana v. Côte d'Ivoire). In relation to the former, exploration (seismic

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[134] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 90.
[135] Ibid, para 91 (but of course on the merits of the case, the Tribunal's finding in para 592 is incompatible with what was held in this phase of the proceedings).
[136] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 95.
[137] Ibid, paras 92-93.
[138] *Aegean Sea Continental Shelf Case* (Provisional Measures) para 32.
[139] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 95.
[140] Ibid, para 96.

research) was of a 'transitory nature'. In the latter, exploitation (drilling) was of a 'permanent nature'. In this connection, the other important factor seems to be the whether the rights claimed may be 'fully restored' or 'reversed'. These factors would also be relevant in relation to EEZ related sovereign rights, such as exploration/exploitation and conservation/management of natural resources.

However, the establishment of an imminent risk of irreparable prejudice to one of the parties constitutes part of the final decision on provisional measures. International courts and tribunals consider the rights of both parties.

3.2 Balancing exercise

International courts and tribunals, in accordance with their judicial function, need to carry out a balancing exercise in relation to the conflicting interests or rights of the parties while considering a request for provisional measures.[141] In its final resolution on provisional measures, the Institut De Droit International has adopted guiding principles, which acknowledge the inherency of such a balancing act to the judicial function of international courts and tribunals. According to the Institute:

> Provisional measures are available if the applicant for such measures can show that: (a) there is a prima facie case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) *the risk of injury to the applicant outweighs the risk of injury to the respondent*; and (d) the measures are proportionate to the risks.[142]

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[141] In his Dissenting Opinion to *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Provisional Measures, Order of 8 December 2000, ICJ Reports 2000, p. 182, Judge Rezek alluded to the balance of interests stating that: "is not a matter of ascertaining whether continuation in force of the arrest warrant against the Congolese Minister causes irreversible prejudice – death aside, little is irreversible – but rather determining whether the indication of a provisional measure would also be liable to cause prejudice no less serious than that sought to be remedied on a provisional basis", see para 6.

[142] 'Final Resolution of the 3rd Commission of the Institute of International Law' (2017) 78 *Yearbook of Institute of International Law* 99, 129, para 2 [emphasis added].

At times, the balancing act may be performed implicitly.[143] Balancing of interests is not a separate condition for prescription of provisional measures, but rather an ancillary exercise if a court or tribunal finds that circumstances meet the conditions of urgency, irreparable prejudice, plausibility of rights and prima facie jurisdiction. Seen this way, where appropriate, courts and tribunals must balance the interests of the applicant for provisional measures with the interests of the defendant whose position may eventually be vindicated and ensure 'proportionality' of the measures.[144]

In *Ghana v. Cote d'Ivoire,* the Special Chamber, conscious that the rights claimed are to be confirmed by the decision on the merits, performed such a balancing act, considering whether benefits to Cote d'Ivoire outweigh the interests of Ghana. What is also significant is that this balancing act also included consideration of injury to the marine environment.[145] While Cote d'Ivoire succeeded in showing the Special Chamber that there was an imminent risk of irreparable prejudice warranting an order of provisional measures, the Chamber considered that "suspension of all ongoing activities" of Ghana in the disputed maritime area would entail the risk of considerable financial loss to Ghana and its concessionaries, and could also cause harm to the marine environment due to deterioration of the equipment.[146] Therefore, an order "suspending all exploration or exploitation activities" conducted by or on behalf of Ghana in the disputed area, would "cause prejudice to the rights claimed by Ghana and create an undue burden on it".[147]

The prudency of the Special Chamber in performing its duty was admirable; the Chamber carefully balanced the rights of the parties and its concern for the preservation of the marine environment in considering the request for an order of provisional measures. Finding that the requests of Cote d'Ivoire would not be 'proportional' pursuant to its examination of both parties interests, and that of the

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[143] See for example, "*Enrica Lexie" (Italy v. India),* Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182, paras 125-126; PCA, *"Enrica Lexie" Incident* (Provisional Measures) Order of 29 April 2016, para 101-102.
[144] Guillame Le Floch 'Requirements for the Issuance of Provisional Measures' in FM Palombino, R Virzo, and G Zarra (eds) *Provisional Measures Issued by International Courts and Tribunals (TMC Asser Press, 2021)* 47-48.
[145] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 101.
[146] Ibid, para 99.
[147] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 100.

environment, on the basis of article 89(5) of the ITLOS Rules, which enable prescription of provisional measures different in whole or in part from those requested, the Special Chamber ordered Ghana to take all the necessary measures to ensure that "no new drilling" takes place, either by itself or under its control, in the disputed area.[148] In doing so, the Chamber allowed the continuation of the ongoing activities by Ghana. In addition, the Chamber ordered Ghana to take all necessary steps to prevent information resulting from its activities not to be used to the detriment of Côte d'Ivoire and carry out strict and continuous monitoring of all its activities to ensure the prevention of serious harm to the marine environment.[149] The Special Chamber also prescribed that both parties take all necessary steps to prevent serious harm to the marine environment and pursue cooperation and refrain from any unilateral action that might lead to aggravation of the dispute.[150] Therefore, it is important to note that ITLOS not only balances the rights of the parties but balances at the same time the need to protect and preserve the marine environment, going beyond the interests of the parties to take into account broader concerns and interests.

4 The contribution of provisional measures to the management of disputed maritime areas

By compiling experiences from earlier provisional measures proceedings, and analysing the procedure and measures ordered by courts and tribunals, not strictly from cases concerning disputed maritime areas, this section aims to illustrate the role that courts, and tribunals play in managing disputed maritime areas.

4.1 General remarks

Provisional measures must be aware that measures can only be granted within the parameters of protection and preservation of rights – ensuing from the specialised nature of provisional measures – that are in dispute and in the case of ITLOS, also for protection and preservation of the marine environment. The ICJ and ITLOS have dealt with many cases involving disputed maritime areas in which parties have never requested provisional measures, pointing to the fact that provisional measures are not

[148] Ibid, para 102 and 108(a).
[149] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 108(b) and (c).
[150] Ibid, para 108(d) and (e).

utilised in every case. For instance, the ICJ has decided 17 maritime delimitation cases to date, but only in three of those cases were provisional measures requested, and only one request was successful, i.e. in the *Land and Maritime Boundary between Cameroon and Nigeria,* which was not solely a maritime dispute.[151] ITLOS has decided two maritime delimitation cases, to date, but provisional measures were requested only in one of those cases, where the Chamber granted the request by Cote d'Ivoire for provisional measures with modifications, as discussed above.[152] Arbitral Tribunals have also decided five maritime delimitation disputes, but no provisional measures were requested by the parties.[153] This section aims to explore how provisional measures may be beneficial in the management of the disputed maritime areas, and as already mentioned to reflect on the potential of provisional measures proceedings to address not only the bilateral concerns but also the broader interests involved. The following discussion considers types of measures ordered, the procedure involved and potential practical implications arising from provisional measures.

4.1.1 Oversight/monitoring mechanism

One of the important aspects of the provisional measures procedures before international courts and tribunals is the power vested in these institutions to monitor compliance. One of the 'major innovations' in the ICJ's procedure was the adoption of article 78, which provides that "[t]he Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated".[154] This Rule aimed to strengthen the authoritativeness of an order of provisional measures.[155] However, it is argued that a request under article 78 of the ICJ Rules do not amount to 'monitoring' or 'oversight' mechanism.[156] This is because the ICJ did not monitor compliance on an ongoing basis, but rather assessed compliance while deciding claims of breach of obligations arising from provisional

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[151] This information is gathered from the Court's website, where a list of cases is available: https://www.icj-cij.org/en/decisions

[152] A third maritime delimitation case is underway before ITLOS between Mauritius and Maldives, see the list of ITLOS cases available at: https://www.itlos.org/en/cases/list-of-cases/

[153] For the list of maritime delimitation cases decided by arbitral tribunals since the entry into force of the LOSC, see the PCA website: https://pca-cpa.org/en/cases/

[154] ICJ Rules, Article 78.

[155] Rosenne (n 55) 74.

[156] Paola Patarroyo 'Monitoring provisional measures at the International Court of Justice: the recent amendment to the Internal Judicial Practice' *EJIL:Talk!* (21 January 2021) available online at: Paola Patarroyo – EJIL: Talk! (ejiltalk.org).

measures orders at the merits stage.[157] For example, in *LaGrand* at the merits stage, Germany requested the Court to adjudge and declare that the US failed to comply with its international obligations arising from the provisional measures order.[158]

Until more recently, there was not a clear procedure or mechanism whereby the Court could monitor state behaviour with the aim of ensuring compliance with provisional measures while the final decision on the merits is pending. Before discussing the new mechanism adopted by the ICJ, let us consider the Rules of ITLOS on the matter. Article 95(1) of the Rules of ITLOS, introduced an obligation to report on steps taken to ensure compliance with the measures:

1. Each party shall inform the Tribunal as soon as possible as to its compliance with any provisional measures the Tribunal has prescribed. In particular, each party *shall submit an initial report* upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures prescribed.
2. The Tribunal may request further information from the parties on any matter connected with the implementation of any provisional measures it has prescribed.

The practice of ITLOS has been to indicate an exact date by which the initial report is to be submitted to it by the parties. For example, in *Ghana v. Côte d'Ivoire*, the Special Chamber of ITLOS ordered provisional measures on 25 April 2015, and decided that parties shall submit their initial reports on compliance no later than 25 May 2015.[159] It is noted in the Judgment of the Special Chamber that parties had submitted their initial reports on the date set by the Chamber, which are not made public but the Registrar transmits the report of each party to the other.[160] The Chamber also made a further request, pursuant to article 95(2) of the LOSC, to Ghana on 23 September 2016 for transmission of following files by 14 October 2016[161]:

[157] Ibid.
[158] *LaGrand (Germany v. United States of America),* Judgment, ICJ Reports 2001, p. 466, para 116.
[159] *Ghana v. Côte d'Ivoire* (Provisional Measures), para 108 (2).
[160] *Ghana v. Côte d'Ivoire* (Judgment), para 18.
[161] It is also noted in the Judgment that Ghana complied with this request.

(a) the file which Ghana specifically requested the oil companies operating under its authority to compile in order to report on the steps they have taken to comply with the Order
(b) a copy of all reports on activities carried out in the disputed area since 25 April 2015 prepared by the oil companies concerned, relating to the activities of the two drill rigs "West Leo" and "Stena DrillMAX", referred to in the correspondence from Cote d'Ivoire.[162]

This procedure used by ITLOS, in comparison to the procedure under article 78 of the ICJ Rules, creates a monitoring or oversight regime whereby ITLOS can manage the dispute on an ongoing basis.[163] The obligation to report, adopted by ITLOS, has been accepted by states and became a routine in the implementation of provisional measures ordered by ITLOS.[164]

On the other hand, until recently the ICJ had a "discretionary power" to request information on matters concerning implementation, pursuant to article 78 of the ICJ Rules – a "non-compulsory" means of monitoring compliance with provisional measures.[165] It has been opined in the literature that the ICJ's mechanism for monitoring and reporting could be strengthened.[166] With the adoption of a new article to the ICJ's Internal Judicial Practice, there is now a monitoring procedure/mechanism in place at the Court. According to article 11 of the Internal Judicial Practice of ICJ adopted on 21 December 2020, when the Court orders provisional measures, it will create an *ad hoc* committee, made up of three judges, to assist the Court in monitoring and implementation of provisional measures.[167] The committee's duties are to examine the information submitted by the parties in relation to implementation and,

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[162] *Ghana v. Côte d'Ivoire* (Judgment), para 41.
[163] Loris Marotti 'A "Game of Give and Take": The ITLOS, the ICJ and Provisional Measures' in FM Palombino et al. (eds.) *Provisional Measures Issued by International Courts and Tribunals* (Springer, 2021) 131-146, 143.
[164] Ibid. For example, in *Southern Bluefin Tuna*, the Tribunal decided that parties had to submit the first report within 40 days of the order on provisional measures. In in *Land Reclamation*, parties had to submit the report within three months.
[165] Marotti (n 162) 143.
[166] For suggestions for strengthening the ICJ's monitoring capacity, see Massimo Lando, Compliance with Provisional Measures Indicated by the International Court of Justice, (2017) 8 *Journal of International Dispute Settlement* 22, 48.
[167] Internal Practice of the ICJ, Article 11(i).

report periodically to the Court, making recommendations on potential options for the Court.[168] It remains to be seen how this new procedure will be applied in practice. But in theory, the Court has established the procedure for monitoring compliance.

As the practice of the Special Chamber in *Ghana v. Cote d'Ivoire* shows, the order of provisional measures together with the compliance procedure utilised by ITLOS created a temporary oversight mechanism over the disputed maritime area and parties' behaviour, especially on Ghana's as the respondent in the provisional measures proceedings. The oversight/monitoring power of courts and tribunals arguably play a role in the management of the tensions between states as well as the respect for the measures ordered. Such a mechanism, no doubt, would be beneficial for states wishing to ensure preservation of status quo in relation to the disputed maritime area, pending the decision on the merits.

4.1.2 Facilitation of negotiations

Another aspect, or observation, that emerges in the context of provisional measures, and also more generally international arbitration or adjudication, is that cooperation is reinvigorated between the parties so that the dispute is actually settled, or a provisional arrangement is voluntarily arrived at by the parties. This phenomenon is referred as out-of-court settlement.[169] In the *Passage through the Great Belt* case, while Finland's request for provisional measure did not succeed, the dispute was settled by negotiation and the case was discontinued. The case concerned a bridge, proposed to be built over one of the straits linking the Baltic and Kattegat, which would block oil rigs and similar vessels coming and leaving Finland's ports and shipyards. Finland disputed Denmark's right to build the bridge and requested an order of provisional measures to suspend Denmark's activities.[170] Finland's request for provisional measures failed to establish the necessary urgency as the project could be reversed if Finland succeeded at the merits and that the decision on the merits would be given before the bridge could be finished at the end of 1994.[171] The proceedings, thus, gave

[168] Ibid, Article 11(ii).
[169] Yoshifumi Tanaka, 'Out-of-Court Settlement' (January 2020) in *Max Planck Encyclopedia of Public International Law* (online edn).
[170] *Passage through the Great Belt* (Provisional Measures), para 7(1).
[171] Ibid, para 27.

Finland the guarantee that Denmark would not be able to present a *fait accompli.* What is also significant is that the Court by reminding the parties what was at stake in the merits phase, i.e., for Denmark termination of the project and for Finland the possibility that construction of the bridge would not infringe any right appertaining to it, facilitated the resumption of negotiations for the settlement of dispute.[172]

In the *Arbitral Award of 1989,*[173] Guinea-Bissau submitted a dispute against Senegal concerning the existence and validity of the arbitral award delivered on 31 July 1989 by the Arbitration Tribunal for the Determination of the Maritime Boundary between the two States, and asked the ICJ, pending its decision on the merits, to order the following provisional measure "[i]n order to safeguard the rights of each of the Parties, they shall abstain in the disputed area from any act or action of any kind whatever, during the whole duration of the proceedings until the decision is given by the Court".[174] Guinea-Bissau claimed that the basic dispute between the parties concerned "the conflicting claims…to control, exploration and exploitation of maritime areas" thereby, arguing that the measures requested and the case on the merits were related.[175] With this request, Guinea-Bissau clearly intended to prepare the ground for its possible arguments regarding the maritime area during the merits phase.[176] However, the attempt to expand the subject-matter of the case was rejected by the Court. The ICJ reiterated that the case was solely about the validity of the Award of 1989 and the rights sought to be made the subject of provisional measures were not subject of the dispute on the merits.[177] It is also worth noting that Guinea-Bissau made another application to the Court while the proceedings were still ongoing in the *Arbitral Award of 1989.*[178] However, it was agreed that no action were to be taken in this case until the Court delivered a judgment in the case concerning the *Arbitral Award*.[179] In the Judgment phase of the proceedings, the issues not settled by the Award of 1989

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[172] *Passage through the Great Belt* (Provisional Measures), paras 31-35.
[173] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, ICJ Reports 1991, p. 53.
[174] *Arbitral Award of 31 July 1989* (Provisional Measures) Order of 2 March 1990, ICJ Reports 1990, p. 64, para 3.
[175] Ibid, para 25.
[176] JG Merrills, 'Reflections on the Incidental Jurisdiction of the International Court of Justice' in MD Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart Publishing 1998) 57–58.
[177] *Arbitral Award* (Provisional Measures), para 26.
[178] *Maritime delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)* Application Instituting Proceedings filed on 12 March 1991
[179] Information available at the ICJs website: https://www.icj-cij.org/en/case/85

were left to the parties for settlement.[180] Throughout this case, what the applicant had in mind was the resolution of the unsettled issues regarding maritime delimitation. Despite the fact that Guinea-Bissau's claims failed, both in relation to provisional measures and later on the merits, the Court played an active role in the facilitation of negotiations between the parties by directing them to reach an out-of-court settlement.[181] The proceedings before the Court facilitated negotiations between the parties, resulting in the Management and Cooperation Agreement of 14 October 1993, a joint development agreement.[182] This was later supplemented by the Protocol Relating to the Organisation and Operation of the Agency for Management and Cooperation of 12 June 1995.[183] Nevertheless, Guinea-Bissau lost some bargaining power as the resulting joint development agreement gave a share of only 15 per cent of continental shelf resources and 50 per cent of fishery resources exploited to Guinea-Bissau.[184]

Moreover, as the *Southern Bluefin Tuna* cases illustrate, "the international community can take some encouragement from the role that formal third party dispute settlement proceedings played as a catalyst in bringing about the resolution of a significant dispute in the difficult area of fisheries between three friendly countries".[185] The dispute between Australia, New Zealand and Japan was submitted to an Annex VII arbitration whereas a provisional measures request was filed with ITLOS pending the constitution of the arbitral tribunal on 30 July 1999.[186] ITLOS prescribed a series of measures on 27 August 1999, including that parties "should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna".[187] This particular order, an indeed many others, is of procedural nature, which focuses on promoting cooperation between the parties. For example,

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[180] *Arbitral Award of 31 July 1989* (Judgment), para 68.
[181] Tanaka (n 168) para 8.
[182] Management and Cooperation Agreement between the Government of the Republic of Senegal and the Government of the Republic of Guinea-Bissau, 1903 *UNTS* 3 (adopted 14 October 1993, entered into force 21 December 1995).
[183] Protocol to the Agreement of 14 October 1993, concerning the organization and operation of the Management and Cooperation Agency 1903 *UNTS* 3 (adopted 12 June 1995, entered into force 21 December 1995).
[184] Management and Cooperation Agreement (n 181), article 2.
[185] Bill Mansfield 'The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska's Article' (2001) 16 *The International Journal of Marine and Coastal Law* 361, 366.
[186] Separate requests were made by Australia and New Zealand, but the ITLOS joined the proceedings.
[187] *Southern Bluefin Tuna* (Provisional Measures) Operative Part of the Order, para 1(e).

similarly in MOX plant, ITLOS ordered procedural measures, as a matter of precaution, even though there was no urgency to prevent the construction of the plant.[188] Parties were to cooperate and "for that purpose enter into consultations".[189] Returning to the role played by measures ordered by ITLOS in *Southern Bluefin Tuna* in the dispute, the Tribunal (in its Award on Jurisdiction and Admissibility)[190] made observations about parties' compliance with the provisional measures, importantly Japan's cessation of the experimental fishing programme, and the impact of both the provisional measures and the proceeding before the arbitral tribunal on the perceptions of the parties.[191] The Tribunal further placed emphasis on the importance of continuing with the efforts to resolve the dispute, which prepared the groundwork for returning to negotiations and eventually the final settlement of the dispute between the parties.[192]

Given these wider examples regarding the impact of third-party dispute settlement process on resolution of the dispute between parties, the question is could we expect a similar result in cases of disputed maritime areas? While much would depend on the relationship and the attitude of the parties, there is reason to be optimistic about such an outcome, if parties can secure "carefully crafted provisional measures" which "may have an implication for the future actions of the parties".[193] If parties are ordered procedural measures to continue negotiations[194] to resolve their dispute and cooperate, such as in *Southern Bluefin Tuna* and the *MOX Plant* (even if the measures requested by the applicant are not ordered) there is every chance that parties can arrive at a provisional arrangement regarding their disputes about the management of

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[188] *MOX Plant* (Provisional Measures) 84, "[c]onsidering that, in the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate".
[189] Ibid, operative part of the order, para 1.
[190] *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)* Award on Jurisdiction and Admissibility, rendered by the Arbitral Tribunal constituted under Annex VII of the LOSC, 4 August 2000 (hereinafter '*Southern Bluefin Tuna Award*'). Jurisdiction was declined.
[191] *Southern Bluefin Tuna Award,* para 67.
[192] *Southern Bluefin Tuna Award,* paras 67-70; Tim Stephens 'The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case' (2004) 19 *The International Journal of Marine and Coastal Law* 177, 183-186.
[193] Rosenne (n 55) 157.
[194] Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press, 2018) 319-320.

disputed maritime areas or resolution of the dispute over maritime areas altogether.[195] Although we have the example of *Aegean Sea Continental Shelf* whereby, institution of proceedings did not facilitate, to date, the resolution of the dispute, one must keep in mind, that the ICJ refused to order any provisional measures and, the overall context of Greek-Turkish relations, which are weighed down by a number of multifaceted longstanding disagreements. In fact, there was some discussion about whether the ICJ should or could have done more in order to prevent aggravation or extension of the dispute.[196] It is argued that such procedural measures such as those ordered in *MOX Plant* "introduced a rather novel and positive approach to the use of provisional measures as a conflict reducing device".[197] As the eventual resolution of some of these disputes discussed in this section, such as between Denmark and Finland, Ireland and the UK suggests that even when request for an order is rejected, going through a third-party dispute settlement may bring home the message that negotiations accord states more power over their affairs, and states may find that common ground is within reach in negotiations. This might be the case because, as reflected upon in the Award on Jurisdiction and Admissibility in the *Southern Bluefin Tuna Arbitration,* procedures before international courts and tribunals force parties to formulate their claims, and in doing so parties have to reconsider the precise differences separating them.[198] This may result in the realisation of their flexibility to the matters that divide them.[199]

4.1.3 Inclusion of third parties: multilateral institutions

Another pattern or observation in the measures ordered by international courts and tribunals is that, at times, the measures ordered create "a system of guarantors" whereby "third party is involved in a sort of monitoring process created by [the provisional] measure".[200] In such cases, courts and tribunals go beyond the interest of

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[195] This possibility of the positive outcome is reinforced by the monitoring power of international courts and tribunals as discussed in section 4.1 above.
[196] Three judges voiced in their separate opinions that the Court also had a role to ensure the dispute was not aggravated or extended, even if there was no basis to order provisional measures. See, Sep. Opinion of Judge Lachs, of Judge Tarazi and of Judge Elias in *Aegean Sea Continental Shelf* (Provisional Measures). However, this debate is now considered closed given the more recent jurisprudence of the ICJ, see Floch (n 142) 19-54.
[197] Robin Churchill 'MOX Plant Arbitration and Cases' (June 2018) in Max Planck Encyclopaedia of International Law (online ed) para 21.
[198] *Southern Bluefin Tuna Award* para 68.
[199] Ibid.
[200] Justine Bendel, 'The Provisional Measures Orders in International Environmental Disputes: A Case for International Courts and Tribunals' (2019) 88 *Nordic Journal of International Law* 489, 517 and 520.

the parties by 'creating regimes', "understood as a framework within which multiple actions by multiple actors can be taken".[201] Creating regimes through provisional measures seem fitting in circumstances where not only interests of two states are involved but also broader interests, such as that of the international community, i.e., protection of the marine environment. Also, with the inclusion of a third party, in this context a multilateral institution, creates a regime whereby the institution is "involved in a sort of monitoring process created by the [provisional] measures [ordered].[202]

For example, in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*[203], the court ordered provisional measures in relation to protection of the wetland in the disputed territory between Costa Rica and Nicaragua. In particular, the ICJ ordered Costa Rica to consult with the Secretariat of the Ramsar Convention[204], as the disputed area composed of wetlands protected by the Convention, in relation to its activities concerning protection of the environment and give Nicaragua prior notice of its activities and make every effort to find common solutions with Nicaragua in relation to protection of the environment.[205] In arriving at this decision, the Court made reference to the parties' obligation under article 5 of the Ramsar Convention, which require that parties to consult and cooperate "in the case of a wetland extending over the territories of more than one Contracting Party or shared by Contracting Parties" concerning conservation of wetlands.[206] According to Bendel, the Secretariat's "role is to guarantee the good execution of the provisional measure ordered by the Court".[207] Moreover, inclusion of multilateral institutions within the process of provisional measures serves to ensure better cooperation between the parties and implementation of the order.[208] Their inclusion than means they can have a direct role in the management of the dispute between parties. The other case in point

[201] Ibid, 521.
[202] Bendel (n 199) 520.
[203] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, ICJ Reports 2011, p. 6 (hereinafter '*Certain Activities Case'*).
[204] *Ramsar Convention on Wetlands of International Importance* (1971).
[205] *Certain Activities Case* (Provisional Measures), paras 80 and 86(2).
[206] Ibid, para 79; Article 5 of *Ramsar Convention on Wetlands of International Importance*.
[207] Bendel (n 199) 521.
[208] Ibid.

in this connection is *Temple of Preah Vihear*[209] in which the ICJ ordered parties to continue cooperation through the Association of Southeast Asian Nations (ASEAN).[210]

In its Order of 18 July 2011, the Court ordered provisional measures requiring, among other things, both Parties to withdraw their military personnel from a "provisional demilitarized zone" surrounding the Temple, and also to "continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone".[211] Thus, parties were not only ordered to cooperate but also requested that they allow observers appointed by ASEAN to access the demilitarised zone. This in a way gave a "mandate" to the institution in question to "implement orders".[212] Put differently, inclusion of this third party was a means of ensuring that parties respect the order.

As it has been argued previously in this thesis, the management of disputed maritime areas raises some issues that not only concern the two parties such as issues of protection of the marine environment or fisheries are transboundary issues, and as such the concern of the international community.[213] As discussed in Chapter V, there are a number of multilateral regimes that are concerned with marine environmental issues, creation of 'regimes' involving those third parties, such as the CCAMLR or Barcelona Convention, by an order of provisional measures would benefit prevention of 'irreparable harm' to the marine environment. Inclusion of such third-party institutions with a mandate to assist states could also improve the implementation of an order issued by a judicial institution. The question is whether an international court or tribunal is likely to create this sort of 'regime' by including a third party within the provisional measures order in cases concerning disputed maritime areas. It must be said that the courts and tribunals decide whether a certain case warrants an order of provisional measures, similarly, they decide what type of measures are necessary in each case for the purposes of preserving the rights in dispute or for prevention of

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[209] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand),* Provisional Measures, Order of 18 July 2011, ICJ Reports 2011, p. 537 (hereinafter '*Temple of Preah Vihear*').
[210] Ibid, paras 64 and 69(3).
[211] Ibid, para 69 (the operative part of the order).
[212] Bendel (n 199) 524.
[213] See Chapter I and Chapter V.

irreparable harm. In the pursuit of the latter purposes, the judges have certain margin of appreciation in the 'design' of measures.[214] Bendel suggests in cases concerning the environment, whether the courts or tribunals would create regimes involving third parties is a question of gravity.[215] In addition to the gravity of the situation and other requirements warranting the exercise of the exceptional power to order provisional measures, inclusion of third parties seem to relate to pre-existing commitments of cooperation within the multilateral regimes concerned.[216] As such, it is probable that a court or tribunal may include a third party, namely, multilateral institutions in the context of disputed maritime areas, if parties are already cooperating through multilateral regimes or if they have specific obligations to cooperate under them. However, the function of inclusion of multilateral institutions here is different to what has been discussed in Chapter V. Here the role of multilateral institutions would be to facilitate cooperation between parties and observe or monitor the implementation of the provisional measures order.

4.2 Order may prove ineffective

Finally, it must also be noted that the order may not be respected by one of the parties. Here, as there is no example from maritime boundary disputes, the provisional measures orders of *Genocide Convention* case[217] will be used to illustrate this point. In April 1993, the ICJ ordered provisional measures, requested by Bosnia and Herzegovina, mainly directed to Yugoslavia, urging the State to take all necessary steps to prevent genocide. Bosnia and Herzegovina submitted a second provisional measures later in September which went beyond the issue of genocide and hence, the Court's jurisdiction. Nevertheless, the Court, stressing that it was not satisfied that everything has been done to prevent the commission of genocide, renewed the measures indicated in its previous order to be immediately and effectively implemented.[218] As events unfolded, and the world witnessed the genocide,

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[214] Bendel (n 199) 516-517.
[215] Ibid, 521.
[216] In the case of *Certain Activities*, the ICJ acknowledges that both parties have specific obligations to cooperate under the Ramsar Convention and in the *Temple of Preah Vihear* the Court acknowledges that parties started a process of cooperation within the ASEAN.
[217] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, p. 3 and Order of 13 September 1993, ICJ Reports 1993, p. 325.
[218] *Genocide Convention* (Provisional Measures), para 57.

provisional measures ordered in this case proved ineffective and protection of rights *pendente lite* failed.[219] At the merits stage, failing to observe obligations pursuant to provisional measures ordered by a court or tribunal, a non-compliant state would be in breach of binding orders. A form of compensation, the nature of which depends on circumstances, is likely to be ordered by a court or tribunal to redress the damages caused by non-compliance. In the *Genocide Convention Case,* the Court considered the non-compliance with the provisional measures as an aspect, and part of, Yugoslavia's breach of the substantive obligations for the purposes of reparations and concluded that its declaration was appropriate form of reparation in the case.[220] It is to be seen whether the ICJ's new practice for monitoring compliance can minimise the potential ineffectiveness of provisional measures orders.

5 Conclusion

The subject matter of this chapter, the role of courts and tribunals in disputes between states, has occupied a great many of international lawyers and academics. While aiming to answer the research questions posed, this chapter also contributes to the overarching debate by considering the role of courts and tribunals in the context of disputed maritime areas. This chapter has argued that international courts and tribunals, as institutions (a pillar of governance), have a role to play and can contribute to the process of managing disputed maritime areas. The argument is illustrated by focusing on the provisional measures procedures before international courts and tribunals.

This chapter begun by considering a doctrinal question regarding the scope of the optional exception to the jurisdiction of compulsory and binding procedures under Part XV of the LOSC. It has been argued that disputing states have the option to resort to binding and compulsory procedures under the LOSC even if one of the parties have a declaration exempting disputes concerning maritime boundary delimitations. This

[219] Putting these aside, the applicant, Bosnia Herzegovina, notwithstanding that assessments at this stage of the proceedings are *prima facie*, has made its case and got international profile for its claims. Even if the respondent disregards a provisional measures order, Merrills has argued that the applicant state succeeded and gained an advantage while the respondent lost face, Merrills (n 175) 54.
[220] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ICJ Reports 2007, p. 43, para 469.

chapter illustrated that courts and tribunals can pronounce on claims concerning breaches of the obligations not to jeopardise or hamper and the obligation to make every effort to enter into provisional arrangements. States may make submissions concerning existing provisional arrangements or pronouncing on suitable arrangements and direct parties to negotiations to find an agreeable arrangement. Importantly, the 'governance' framework offered by this thesis and principles of governance discussed in Chapter II illustrate that states should choose to peacefully manage their disputes, and as shown in this chapter, requesting provisional measures from international courts and tribunals are an effective means of doing so.

To demonstrate the role that international judicial institutions can play in disputed maritime area this chapter has focused on a specific procedure, provisional measures. While not utilised often, a request for provisional measures when tensions are high between disputing states should be considered by disputing states. Courts and tribunals can take actions necessary for the preservation of rights and interest of the parties' vis-à-vis each other. Not only are the rights of parties are considered but also broader interest in proceedings before ITLOS. But the court or tribunal must be satisfied that circumstances warrant an order.

The tests that courts and tribunals look for in each application has been considered in relation to disputed maritime areas. Some of the tests are more easily satisfied in the context of disputed maritime areas, such as plausibility of rights and *prima facie* jurisdiction (but this will depend on whether there is an article 298 declaration and the subject-matter of the dispute). However, states need to ensure that their claim can satisfy the other tests with relatively higher thresholds, namely, irreparable prejudice and urgency. The jurisprudence suggests that acts or activities that cannot be reversed or compensated would satisfy the irreparable prejudice tests. In particular, activities taken in relation to the seabed, if they result in significant and permanent modification of the physical character of the area in dispute, i.e., the seabed and subsoil, would create a risk of irreparable prejudice. Provisional measures may also be requested to prevent serious harm to the marine environment. This may be an avenue to be explored if disputing states are not able to cooperate on the management of living resources and/or conservation of the marine environment and one of the

party's practices carry the risk of serious harm to either a particular stock, or threat to the wider marine ecosystem from pollution.

By drawing on experience based on previous case law from cases concerning maritime delimitation and non-delimitation cases that the procedure, the proceedings, and the way in which the courts and tribunals frame orders can contribute to the management of disputed maritime areas. For example, proceedings provide a platform for parties to clarify their position and also facilitate the engagement of parties with each other by way of directing them to cooperate and consult with each other.

For states, resorting to international courts and tribunals when they are unable to cooperate, ensures that they act in accordance with the principles of peaceful settlement of disputes, cooperation, and non-aggravation of the dispute, as discussed in Chapter II. Provided that states do not wish to participate in, or submit to binding third-party procedures, there are several other means of peaceful dispute resolution that they may resort to in order to seek assistance for the management of disputed maritime areas. Next, this thesis considers one of those means available to states, namely, conciliation.

Chapter VII: Conciliation in the context of disputed maritime areas

1 Introduction

This chapter focuses on the conciliation procedure provided for in the LOSC, in relation to conciliation of issues that arise between states in disputed maritime areas. There are four layers of reasons that make conciliation relevant and worthwhile for consideration in this thesis. First, the discussion of conciliation is consistent with the aim of this this thesis to explore the broader framework within which disputed maritime areas are situated. Second, the normative framework explored in this thesis supports the relevance of conciliation as a means of peaceful settlement of disputes, which is part of the principles of governance discussed in Chapter II. Second, from a practical point of view, some states may not find it appealing to submit disputes concerning the management of disputed maritime areas to judicial institutions, discussed in Chapter VI. Finally, the literature on conciliation in the context of the law of the sea focuses on the issue of maritime delimitation.[1] This chapter wishes to contribute to that literature by means of exploring conciliation in the context of disputed maritime area management.

The UN Charter provides a number of 'peaceful means' available to states in seeking a solution to any dispute, these are negotiation, enquiry, mediation, good offices, and conciliation.[2] The LOSC explicitly calls on states, with reference to the UN Charter[3], to settle disputes by any one of these peaceful means available, granting them freedom of choice.[4] Conciliation is one of those means that may be helpful for states in settling tensions within disputed maritime areas. According to the Institut de Droit International, conciliation is:

> a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or on an ad hoc basis to deal with a dispute, proceeds to

[1] Yoshifumi Tanaka, 'Maritime Boundary Delimitation by Conciliation' (2019) 36 *The Australian Yearbook of International Law Online*, 69.
[2] UN Charter, Article 33.
[3] Article 279 of the LOSC.
[4] Article 280 of the LOSC.

> the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties, with a view to its settlement, such aid as they may have requested.[5]

Conciliation provides a structured process and "occup[ies] a prominent place in the [LOS] Convention" as it is specifically included in Part XV on two separate occasions, and a procedure was set up in Annex V of the LOSC.[6] One finds conciliation explicitly in Section 1 of Part XV.[7] Some literature regard this as significant and perhaps a reflection of an implicit preference of the drafters for utilisation of conciliation as a means of dispute settlement.[8] Furthermore, the Convention also makes it obligatory for states to resort to conciliation, referred as compulsory conciliation, for certain disputes arising under the Convention, pursuant to articles 297 and 298 of Section 2, Part XV.[9] The drafters of the Convention not only dedicated these articles in Sections 1 and 2 of Part XV to conciliation, but also a whole Annex[10], outlining a ready procedure for states should they wish to utilise it.[11] Serdy suggests that the Conference's (UNCLOS III) focus on conciliation as a method of dispute settlement may have contributed to the choice of conciliation by Iceland and Norway as a means of settling their maritime delimitation dispute in 1980.[12] Given that the LOSC gives a considerable degree of prominence to conciliation in order to facilitate resort to it for disputes arising under the Convention (pillar of governance), it is worth considering the role of conciliation in managing disputed maritime areas.

While conciliation seem to be a prominent feature of dispute settlement system of the LOSC, it has been utilised only once since the entry into force of the LOSC. The Jan Mayen Conciliation between Iceland and Norway was concluded prior to the entry into

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[5] Institute de droit international, Resolution on International Conciliation (Salzburg, 1961) Article 1, available online at: https://www.idi-iil.org/app/uploads/2017/06/1961_salz_02_en.pdf
[6] JG Merrills, *International Dispute Settlement* (6th edn, Cambridge University Press 2017) 185.
[7] Article 284 of the LOSC.
[8] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005) 35; Gurdip Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (Academic Publications, 1985) 205.
[9] Article 298 (1)(a)(i) of the LOSC. In particular for those disputes relating to sea boundary delimitations.
[10] See Annex V of the LOSC.
[11] Sienho Yee, 'Conciliation and the 1982 UN Convention on the Law of the Sea' (2013) 44 *Ocean Development & International Law* 315, 319.
[12] Andrew Serdy, Article 284, MN 10, in Alexander Proelss, *UNCLOS: A Commentary.* (Beck, Hart, and Nomos, 2017) 1841.

force of the LOSC.[13] The first ever conciliation under the LOSC was initiated by Timor-Leste in relation to its maritime boundary dispute with Australia in 2016.[14] It was the only compulsory option available under the LOSC for Timor-Leste given that Australia excluded disputes concerning sea boundary delimitations from compulsory dispute settlement procedures entailing binding decisions.[15] The conciliation between Timor-Leste and Australia was concluded with the releasing of the commission's report and recommendations for the parties in 2018.[16] The parties agreed a bilateral agreement establishing their maritime boundaries on 9 March 2018.[17] The Timor Sea Conciliation is relevant and valuable for the insights that it offers on the conciliation process, as well as, its interpretations and the decision on competence for the law of the sea scholars interested in dispute settlement and more broadly to the field of international as an example of non-judicial dispute settlement procedure. The Timor Sea Conciliation encourages us to think about the utility of conciliation for other disputes concerning the interpretation and application of the LOSC.[18] Prompted by this line of thinking, this chapter aims to illustrate that conciliation has a role in, and is part of, the process of managing disputed maritime areas.

With this aim in mind, this chapter considers the following questions: (a) what are the advantages of conciliation as a dispute settlement procedure and what kind of disputes are the most suitable for this dispute settlement procedure?; (b) what are the paths under the LOSC to conciliation?; (c) what are the procedural rules provided for conciliation under the LOSC? and; (d) what disputes may the conciliation commission address in relation to disputed maritime areas?

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[13] 'Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen: Report and Recommendations to the Governments of Iceland and Norway' (1981) 20 *International Legal Materials*, 797 (hereinafter 'Jan Mayen Conciliation Report').

[14] PCA, Press Release 'Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia' dated 29 July 2016, available online at PCA website: https://pcacases.com/web/sendAttach/1813.

[15] Australia's Declaration under 298 of the LOSC.

[16] TS Conciliation Report.

[17] Available in TS Conciliation Report, Annex 28 (The Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea, 6 March 2018).

[18] Natalie Klein, 'Timor Sea Conciliation: A Harbinger of Dispute Settlement under UNCLOS?' in Helene R Fabri and others (eds), *A Bridge over Troubled Waters* (Brill | Nijhoff 2020) 105–146.

First, section 2 provides a brief overview of conciliation as a dispute settlement mechanism, addressing the advantages of conciliation in general. Section 3 discusses the procedural aspects of conciliation with reference to the only LOSC precedent, the Timor Sea Conciliation. The aim is to flesh out, with the help of a practical example, the process and procedure of conciliation. Section 3 moves on to explore whether and how conciliation may assist states in their efforts to manage disputed maritime areas. In doing so, it examines the prerequisites for initiating compulsory conciliation under the LOSC and assesses the question of scope of a commission's competence and proposes some questions that states may find helpful to refer to conciliation. Finally, this chapter offers some concluding thoughts on benefits and drawbacks of conciliating disputed maritime areas.

2 Conciliation as a dispute settlement procedure

The definition of conciliation agreed by the Institut de Droit International presents the key aspects of conciliation, namely, "investigating and clarifying issues in dispute" in fact and/or law with the intention to offer mutually acceptable solution(s) to bring parties to an agreement in relation to their dispute.[19] While conferring competence to a conciliation commission to investigate and make suggestions for the dispute, the states usually dictate the procedure, such as the tasks and how the commission carry out those tasks, based on a bilateral agreement or multilateral treaty setting up the commission. Furthermore, based on the above definition, one may understand conciliation to consist of two phases or steps. The 'conciliation phase' is the initial step. The conciliation phase includes the recommendations or 'the terms of a settlement' produced by the conciliation commission, to use the language of the above resolution. The second phase is 'the decision phase' by the disputing parties. This stage would involve seeing whether the terms of settlement offered by the commission are acceptable to states. The decision phase may see conciliation coming to fruition with the reaching of an agreement, or the process may fail to bring parties to an agreement.[20] It is, therefore, rightly questioned why any state would want to resort to conciliation, which produces non-binding recommendations, thus, carrying the risk of

[19] ibid 111.
[20] Merrills (n 6) 73.

failing to resolve the dispute, unless parties agree to make the resulting recommendations binding. The answer to the 'why' question may be found in the following 'what' question: what are the advantages of conciliation that may make it attractive or useful for certain types of disputes? There are some general advantages of conciliation that are relevant for different types of disputes and also some advantages that may be particularly relevant for disputes over maritime areas.

Before this chapter addresses the general advantages of conciliation, there may be a simple explanation to the question 'why' in the context of the law of the sea dispute settlement. Conciliation may be the only compulsory option available in relation to particular disputes.[21] For example, if one of the claimants of the disputed maritime area does not accept the jurisdiction of international courts or tribunals to hear disputes concerning maritime delimitation[22], conciliation may be the only third-party option available to a state wishing to settle the dispute, unless parties enter into a special agreement. This was certainly the case for Timor-Leste.[23] The compulsory conciliation, under article 298, was the only option open to Timor-Leste that would bring Australia to the table with a third party to settle the maritime boundary dispute.[24] In addition to Australia's declaration exempting 'sea boundary delimitations' from compulsory and binding dispute settlement under article 298 of the LOSC, Australia also has a reservation to its declaration accepting the ICJ jurisdiction as compulsory. The reservation exempts from such jurisdiction disputes "concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation".[25] This reservation is indeed wider than the reservation allowed under article 298 of the LOSC.

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[21] See articles 297 and 298 of the LOSC.
[22] This can be done via a declaration pursuant to article 298 of the LOSC and also by making a reservation in relation to maritime delimitation disputes to the declaration recognising the jurisdiction of the ICJ as compulsory.
[23] The downside being that Timor-Leste knowingly initiated a third-party dispute settlement does not entail a binding decision.
[24] See Declaration of Australia made on 22 March 2002 concerning Article 298 of the LOSC, available online at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en
[25] See Declaration of Australia concerning compulsory jurisdiction of the ICJ under Article 36(2) of the ICJ Statute, 22 March 2002, available online at: https://www.icj-cij.org/en/declarations/au.

Let us turn to the question of the advantages of conciliation as a means of dispute settlement. It is a more flexible process than judicial dispute settlement, such as arbitration and adjudication.[26] Parties may have, depending on whether the voluntary or compulsory conciliation is initiated, a good degree of influence in the process, procedure and outcome.[27] For example, the procedure provided by the LOSC in Annex V is modifiable by states upon agreement.[28] Connected to the second point is a third that conciliation may be attractive to some disputing states for the very reason that the result is non-binding (which of course is a limitation at the same time). During conciliation, states may take up varying positions in the hope of finding a common ground but if the resulting suggestions of the commission do not satisfy one or both of the parties, they are not bound by their positions taken during the conciliation or the recommendations of the commission, and as such, they can freely compromise. This may indirectly increase the likelihood of reaching an agreement. The Timor Sea Conciliation Commission reflected on its report that discussions between the parties were undertaken on a 'no prejudice' basis.[29]

Fourth, conciliation may be attractive given the confidentiality offered by this procedure. This allows states to conciliate without pressure given that the information, documents, and discussions are, as a rule, confidential, unless agreed otherwise by the parties. As such, the confidentiality and non-binding character of the proceedings provide an advantage – it is a 'risk-free endeavour' which may well bear fruit. Indeed, it has been noted that the success of any conciliation procedure hinges upon the confidentiality of the proceedings.[30] However, this potentially oversimplifies the conciliation process and as such needs to be tempered, because after all privacy cannot resolve all the issues dividing the parties. Nonetheless, disputes between two sovereign states usually raise delicate and sensitive issues, sometimes they are a

[26] Elliot L Richardson, 'Jan Mayen in Perspective' (1988) 82 *The American Journal of International Law* 443, 449, 458.
[27] See the discussion below in section 2.1.
[28] Article 10, Annex V of the LOSC.
[29] TS Conciliation Report, para 59
[30] Yee (n 11) 320.

matter of national pride[31], and thus states can only feel comfortable in offering concessions and changing their position when a certain level of privacy is ensured.[32] The report of the Timor Sea Conciliation Commission reflects upon the necessity of confidentiality of the process for successful conciliation in some detail.[33] Though, it is worth noting that the LOSC does not have any explicit requirement for privacy, or, publication of the final report of the Commission. In other words, there does not seem to be an explicit preference by the LOSC for public or private hearings and results. The only requirement is that the report is transmitted to the UN Secretary General.[34] Therefore, the LOSC leaves the decision on privacy and confidentiality to the preference of the states to be agreed with the commission – reinforcing the flexibility point made above. It was the choice of the parties to the Timor-Leste Conciliation to make the report public during the course of the proceedings.[35]

Finally, a conciliation commission is not restricted to considering legal arguments.[36] A conciliation commission can consider other factors, such as equity/fairness among others. For example, in the Jan Mayen Conciliation, the Commission considered a "broad scope of considerations" including "Iceland's strong economic interests, geographical and geological factors and other special circumstances".[37] As a result various concessions were made to Iceland based on the consideration that Iceland's continental shelf have low hydrocarbon potential, among others.[38] If that dispute were to be decided by a court or tribunal, Norway would have gotten a different result.

One can argue that these features of conciliation make it advantageous, or rather, more attractive means of settling certain kinds of disputes. In relation to disputes where there are clear and strict legal rules on the point of dispute amongst the parties, conciliation would not prove very useful, as reiterated by the Jan Mayen Conciliation

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[31] For example, the Aegean Sea disputes between Turkey and Greece are overly politicised domestically by both governments, which in turn mean, a possible settlement might be viewed by some sections of the electorate as backing down and may come with a huge political cost to those in power for giving in to the neighbour on a matter of national pride.
[32] Merrills (n 6) 71.
[33] TS Conciliation Report, paras 60-61.
[34] Annex V Article 7(1) of the LOSC.
[35] TS Conciliation Report, para 61, see footnote 38.
[36] Ibid, para 69-70.
[37] Jan Mayen Conciliation Report (n 13) 825-826.
[38] Richardson (n 26) 447.

Commission, the Commission is not a court of law.[39] It is more appropriate in such circumstances to refer the dispute to arbitration or adjudication. For example, if the dispute concerns whether a state has breached an obligation or not, or whether responsibility is incurred for a particular act or omission.[40] On the other hand, conciliation would prove the most advantageous where complex matters are involved, such as sovereignty disputes or maritime delimitation. For example, the LOSC calls for delimitation of EEZ and Continental Shelf boundaries to be affected by agreement, in order to achieve an equitable solution.[41] In comparison to disputes relating to breach of obligations[42], by their nature disputes over how to manage disputed maritime areas can be settled in various ways. Put differently, the resolution of such disputes can be more flexible. Given that disputes over disputed maritime areas would require flexibility, compromise, balancing of interests, the general features of conciliation discussed above appear promising in terms of facilitating finding of a way forward for the management of disputed maritime areas.

At this point it is worth reflecting on the limitations of conciliation as a means of dispute settlement for disputed maritime areas. While it is an advantage for states to have a great deal of control over the process of conciliation, this is an important limitation on this method of dispute settlement. The initiation of the process (for voluntary conciliation) and the outcome largely depend on the will of the parties and their relationship, meaning that without their will and cooperation, conciliation procedure is at significant risk of resulting in failure. The risk of failure is further exacerbated by the fact that the recommendations of the conciliation commission is not legally binding. Even if parties devote time and effort to conciliation, the non-binding nature of the recommendations raises concern that parties may still fail to reach an agreement. Moreover, there may be sticking points in disputed maritime area management that the parties are not able to agree on. For example, parties may overall agree that a joint/cooperative management of living resources is suitable, but they may yet face difficulties in agreeing on specific details. This may result in conclusion of the

[39] Jan Mayen Conciliation Report (n 11) 823.
[40] Ulf Linderfalk, 'The Jan Mayen Case (Iceland/Norway): An Example of Successful Conciliation' (24 May 2016), 20, available at SSRN: https://papers.ssrn.com/abstract=2783622.
[41] Article 74(1) of the LOSC.
[42] I.e., whose settlement will only go in one of two ways, breach, or no breach.

conciliation process without resolving all outstanding issues. A further important limitation of compulsory conciliation is limitations placed on its availability, as discussed below in Section 3.2. Notably, any dispute over maritime boundaries which involve disputed land sovereignty issues fall outside the scope of compulsory conciliation under Article 298(1)(a) of the LOSC. Existing disputes, such as between Republic of Korea and Japan and Japan and China involve a dispute over sovereignty of islands, namely Dokdo/Takeshima and Senkaku/Diaoyu respectively. For such dispute, compulsory conciliation option is not available.

Following these preliminary and general remarks in relation to potentials and limitations of conciliation as a dispute settlement mechanism, this chapter now turns to the procedure envisaged in the LOSC in more detail.

3 The conciliation procedure under Annex V of the LOSC

There are two potential paths that may take disputing parties to conciliation under the LOSC. The parties to LOSC may either freely choose or may be compelled by the LOSC to conciliate a dispute concerning interpretation or application of the Convention.[43] The LOSC gives states the freedom to choose "peaceful means of their own choice" as an alternative to binding dispute settlement under Part XV.[44] This is in contrast with the compulsory conciliation that disputing state(s) may initiate, pursuant to Section 3, Part XV of the LOSC.[45] Conciliation, in this context, is compulsory in the sense that disputing parties are obliged to resort to conciliation "without any further act of consent" when the subject-matter of the dispute is either automatically outside the purview, pursuant to article 297, or exempted by a declaration pursuant to article 298, from the jurisdiction of the Part XV courts or tribunals.[46] This section shortly turns to consider the procedure outlined in Annex V which applied to both voluntary and compulsory conciliation.[47] Before doing so, it is necessary to note that although

[43] Articles 284 and Articles 297 and 298 of the LOSC.
[44] Article 280 and 281 of the LOSC.
[45] Under articles 297 and 298 of the LOSC.
[46] Natalie Klein 'The Timor Sea Conciliation and Lessons for Northeast Asia' (2019) 6 *Journal of Territorial and Maritime Studies* 30, 35.
[47] Although there are a few specific provisions for compulsory conciliation under Section 2 of Annex V.

compulsory conciliation is concerned with sea boundary delimitations[48], for the reasons that are discussed below compulsory conciliation is still relevant for the management of disputed maritime areas.[49] It is also worth noting that the procedure for both types of conciliation is almost identical, of course except for those aspects that relate to the compulsory nature of conciliation under Section 2, Annex V of the LOSC. Section 2 of Annex V which is concerned with compulsory conciliation, incorporates the articles in Section 1 (which is concerned with voluntary conciliation).[50] For this reason, this chapter utilises the Timor Sea Conciliation (a compulsory conciliation example) as a practical example to draw from, and refer to, while explaining the procedure of conciliation insofar as both of the procedures are identical.

3.1 Voluntary conciliation procedure

Starting with voluntary conciliation, states may initiate conciliation pursuant to article 284 of the LOSC, which provides that:

> 1. A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure.
> 2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.
> 3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.
> 4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

As these provisions make clear, a party may submit a dispute concerning interpretation or application of the Convention to conciliation upon 'invitation' and only by 'acceptance' of that invitation. In other words, consent of both parties to a dispute is necessary for the initiation of conciliation.[51] One issue that the text is silent on is 'when' a state may proceed with the possibility of pursuing conciliation by way of

[48] If states make a declaration under article 298(1)(a)(i) of the LOSC removing sea boundary delimitation disputes from compulsory procedures, they are required to submit to conciliation, subject to certain conditions. For the discussion of these conditions see section 3.2.1 below.
[49] See section 4 below.
[50] See article 14 of section 2, Annex V of the LOSC.
[51] Article 284 (1) (2) and (3) of the LOSC.

invitation to the other state.[52] There are number of articles that guide states in this respect.

First, article 280 of the LOSC provides that the parties have the right "to agree at *any time* to settle a dispute between them…by any peaceful means of their own choice".[53] Therefore, given that parties may agree to settle the dispute at any time coupled with the silence of article 284 on a time frame, may suggest that invitation to pursue conciliation, and in turn agreement on conciliation, may occur at any time. Second, it is important to attach some value to the placement of article 284 of the LOSC in the text. The placement of article 283 of the LOSC, prescribing that parties exchange views regarding the settlement of the dispute, immediately before the conciliation provision suggests, according to Serdy, that "this exchange is the most likely juncture" for invitation to be presented to the other party.[54] While this interpretation suits some disputes, when the dispute concerns delimitation of maritime areas and/or governance of disputed maritime areas, parties have likely been negotiating, or enhancing views for some time, on various occasions, pursuant to articles 74 and 83 of the LOSC.[55] The exchange of views must have taken place if the parties wish to submit the dispute to compulsory procedures under Part XV, as this is a procedural obligation, a court or tribunal could decline jurisdiction as a result. However, since this is a voluntary process dependent on agreement, this only provides guidance to states on when they may present an invitation for conciliation to the other party. As such, it is arguable that invitation for conciliation, in relation to disputed maritime areas, may take place at any time.

After the presentation of the invitation by one of the parties to the other, and if invitation is accepted, parties can proceed to agree on a procedure, either on the procedure in Annex V, or another procedure of their choice – they may adopt readily available model procedures or make an *ad hoc* agreement.[56] If parties cannot agree on a procedure,

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[52] Serdy (n 12) MN 3.
[53] Article 280 of the LOSC [emphasis added].
[54] Serdy (n 12) MN 3.
[55] Articles 74(1) and 83(1) of the LOSC. These indirectly pose an obligation to negotiate on delimitation.
[56] There are other procedures available to states, such as: UN Model Rules for the Conciliation of Disputes between States, UN General Assembly, (UN Doc. A/RES/50/50) 11 December 1995, available

then conciliation is deemed as terminated.[57] This chapter focuses on the procedure provided for in Annex V of the LOSC.[58] Let us now reflect on the procedure provided for in relation to conciliation.

Article 1, Annex V of the LOSC reflects the importance of 'agreement' between the parties – as dispute settlement procedures under Section 1, Part XV of the LOSC rest on the parties' freedom of choice.[59] After parties have agreed to submit the dispute to "conciliation under this section, any such party may institute the proceedings by written notification addressed to the other party or parties".[60] Within this notification the party instituting the proceedings names its choice of two conciliators, one of them may be a national, to begin the constitution of the conciliation commission in accordance with article 3, Annex V of the LOSC.[61] The conciliators are chosen from the list of conciliators maintained by the UN Secretary General – each party to the Convention is entitled to nominate four conciliators to the list.[62] After the other party also names two conciliators, one of whom may be its national, the four conciliators appoint the fifth conciliator to act as the chairperson.[63] If the appointments are not made within 21 days of the written notification instituting the proceedings, the party instituting the proceedings may either terminate the proceedings, or, request the Secretary General to make the remaining nominations.[64]

The default rule in Annex V is that the commission decides its own procedure, unless the parties otherwise agree.[65] For example, the Timor Sea Conciliation Commission adopted its Rules on Procedure for the proceedings, noting that they were supplementary to those contained in Annex V.[66] As noted above, the LOSC does not

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at: https://www.un.org/ga/search/view_doc.asp?symbol=a/res/50/50 ; PCA, Optional Conciliation Rules, available at https://docs.pca-cpa.org/2016/01/Permanent-Court-of-Arbitration-Optional-Conciliation-Rules.pdf.

[57] Article 284(3) of the LOSC.

[58] Simply put, it is not possible to account for all types of conciliation procedures that states may choose from, and it would exceed the scope of this thesis to do so.

[59] Article 1 Annex V of the LOSC; Article 280 of the LOSC.

[60] Article 1, Annex V of the LOSC.

[61] Ibid, Article 3(b).

[62] Article 2 of Annex V of the LOSC.

[63] Ibid, Articles 3(c) and (d).

[64] Articles 3(d) and (e) of Annex V of the LOSC.

[65] Article 4, Annex V of the LOSC.

[66] Timor Sea Conciliation, Rules of Procedure, at p. 1, available online at: https://pcacases.com/web/sendAttach/2357 (hereinafter 'TSC Rules of Procedure').

contain explicit rules on confidentiality of the procedure.[67] As a result, the Timor Sea Conciliation Commission adopted detailed provisions on 'Transparency and Confidentiality'.[68] If there are any disagreements between the parties on the detailed rules about the procedure, the commission resolves such disagreements pursuant to the power granted to it under article 4, Annex V of the LOSC.[69] On all procedural matters, including the final report and its recommendations to the parties, the commission makes decisions by a majority vote of its members.[70] The final point detailed about the procedure in article 4 of Annex V is that, the conciliation commission may, with the agreement of the parties, invite the parties to submit their views orally or in writing.[71] The power granted to conciliation commissions to determine their own procedures is significant – it helps move the process forward if parties are in disagreement on this matter.

Annex V of the LOSC reinforces the idea that the conciliation is essentially about 'amicable settlement' of the dispute, in which the commission plays a facilitative role.[72] This underscores, according to Hamamoto, that conciliation is a non-binding dispute settlement procedure, whereby the settlement of the dispute rests, at the end of the day, on an agreement between the states.[73] The Timor Sea Conciliation Commission highlighted another important aspect of this provision which empowers it to "draw the attention of the parties to *any measures* which might facilitate an amicable settlement".[74] According to the Conciliation Commission this "extremely broad" provision enabled it to deal "comprehensively with the Parties to address the issues *necessary* to achieve an amicable and durable settlement".[75] In other words, the Commission's interpretation implies that its mandate/competence was not restricted to "assist[ing] Timor-Leste and Australia in reaching an amicable settlement of their

[67] Yee (n 11) 320.
[68] TSC Rules of Procedure, Article 16.
[69] Ibid.
[70] Article 4 of Annex V of the LOSC.
[71] Ibid, TSC Rules of Procedure, Articles 13 and 18(4) provides detailed rules on written submissions.
[72] Article 5 of Annex V of the LOSC.
[73] Hamamoto 'Annex V, Article 5' MN 3 in Alexander Proelss, *United Nations Convention on the Law of the Sea: A Commentary.* (1st edn, Hart 2017)
[74] Article 5, Annex V of the LOSC [emphasis added].
[75] TS Conciliation Report, para 62 [emphasis added].

dispute relating to the delimitation of their permanent maritime boundaries".[76] Rather than restricting itself to the main element of the dispute, i.e. delimitation of the maritime boundary, the Commission engaged with other issues necessary for an amicable settlement, such as the proposal and agreement on a package of confidence-building measures and the Special Regime for the Greater Sunrise.[77] In other words, a conciliation commission is not restricted in terms of issues or matters that it can address and considerations that it may take into account in order to offer the parties 'recommendations' on which an agreement can be reached. This is an important point to which this chapter returns later. [78]

Another process of the conciliation procedure regulated by Annex V of the LOSC is the right of the parties to be heard by the conciliation commission. In the words of the Convention, "the commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement".[79] The Timor Sea Conciliation Commission's Rules on Procedure mirror these provisions but provide more detail. As supplementary to the right of the parties to be heard, there is a significant emphasis on the Commission's impartiality, independence, objectivity, and fairness in the proceedings.[80] Moreover, the Timor Sea Conciliation Commission's Rules on Procedure are reflective of the general flexibility with which conciliation commissions can undertake the conciliation procedure. Paragraphs 4 and 5 of Article 18, of the Rules on Procedure are good examples of the flexibility in the procedure. For example, the Commission may meet or communicate with the parties "together or with each of them separately" either "orally or in writing".[81]

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[76] Timor Leste's Notification Instituting Conciliation under Section 2 of Annex V of the LOSC, 11 April 2016, para 8, TS Conciliation Report, Annex 3, available at PCA website: https://pca-cpa.org/en/cases/132/ .

[77] 'Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission constituted pursuant to Annex V of the United Nations Convention on the Law of the Sea', 24 January 2017, ('hereinafter' Trilateral Joint Statement of January 24') available at PCA website: https://pca-cpa.org/en/cases/132/ ; TS Conciliation Report, para 297 (Greater Sunrise).

[78] See, section 3.2 below.

[79] Article 6, Annex V of the LOSC.

[80] For example, see Article 18(2) of the TSC Rules on Procedure: "2. The Commission shall hear the parties, examine their claims and objections, make proposals to the Parties, and otherwise assist the Parties in an independent and impartial manner with a view to reaching an amicable settlement. The Commission will be guided by principles of objectivity, fairness, and justice, giving consideration to, among other things, the rights and obligations of the Parties and the circumstances surrounding the dispute, including any previous practices between the Parties".

[81] Article 18(4) of the TSC Rules of Procedure.

The Commission may hold "separate meetings with" one of the parties "in conjunction with a joint meeting between the Commission and the Parties or as a distinct phase of the proceedings".[82] The rules on procedure also allow the chairperson, "for reasons of efficiency", with or without other Conciliators to meet separately with one of the parties "at any appropriate point in the conciliation process".[83] According to the Report of the Timor Sea Conciliation Commission, the parties and the Commission favoured this "flexible and informal approach to enable the Commission to follow the path that it considered most likely to lead to an amicable settlement".[84] In fact, the Commission met separately, most of the time and "most important discussions with each Party" occurred in separate meeting sessions.[85] The flexibility in the procedure plays an important role by providing, first, informal discussions to take place between regular meetings, and second, an environment in which sensitive conversations can occur with the parties, in support of the overall procedure – which are unlikely to occur during the joint meetings.[86]

Another hallmark of the conciliation procedure is the report of the conciliation commission. Article 7, Annex V of the LOSC provides that the commission "shall report within 12 months of its constitution".[87] As such conciliation is a relatively quick process[88], at least in theory, in comparison with the length of time that an arbitration or adjudication procedure may take – usually spanning several years.[89] The Timor Sea Conciliation was concluded in just a little over two years – from the institution of the proceedings to the publishing of it report.[90] As such, the deadline adopted in the LOSC seems unrealistic, however it was probably a practical decision to dissuade the parties from stalling the procedure unnecessarily. Furthermore, the Commission had to interpret the interaction of its duty to decide any disagreements over its competence pursuant to Article 13 (Section 2, Annex V) and the deadline provided for in Article 7,

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[82] Ibid, Article 18(5).
[83] Ibid.
[84] TS Conciliation Report, para 57.
[85] Ibid.
[86] TS Conciliation Report, para 58.
[87] Article 7 of Annex V of the LOSC.
[88] Conversely, Yee considers this 12-month period as "lengthy", see Yee (n 11) 320.
[89] Klein (n 18) 116.
[90] In this case, the length of conciliation was extended with agreement the parties pursuant to article 20(4) of the TSC Rules of Procedure.

Annex V of the LOSC. The Commission concluded that the 12-month period begins to run on the date of its decision on competence.[91] Noting again that the Timor Sea Conciliation was a case of compulsory conciliation, whereby the provisions in Section 1 of Annex V (concerning voluntary conciliation) are applicable subject to Section 2 of Annex V (compulsory conciliation). Therefore, this specific interpretation is only relevant for cases of compulsory conciliation.

Article 7, Annex V of the LOSC also prescribes that the commission shall record agreement(s) reached, or in the absence of an agreement, record its conclusions on questions of fact or law relevant to the dispute and recommendations for an amicable settlement. As mentioned above, the reports are deposited with the UN Secretary-General, whom transmits the report to the parties to the dispute.[92] Proceedings are deemed to be terminated when parties reach an agreement; one party rejects recommendations of the report by written notification addressed to the Secretary-General of the UN; or after the lapse of three months from the date of transmission of the report to the parties.[93] In the case of Timor Sea Conciliation, the Commission notes that conciliation proceedings ended pursuant to signing of the maritime delimitation agreement on 6 March 2018, and published its report and recommendation on the 9 May 2018.[94]

Timor Sea Conciliation Commission made another interesting point regarding the report of a conciliation commission, worthy of a note. It concerns reporting of conclusions on "questions of fact or law" pursuant to Annex V of the LOSC.[95] Parties engaged with some discussion with the commission on the extent to which a commission should engage with questions of international law during the proceedings.[96] On this point, the Commission considered that "it cannot be

[91] Timor-Leste Australia Conciliation, Decision on Competence, paras. 109-110. The conclusion was justified on the basis that "[a]ny other approach would run the risk of a commission failing to give proper consideration to a justified objection to competence or alternatively of giving such objections appropriate attention only to find that too much time had elapsed for the parties to fairly evaluate whether the conciliation process was likely to prove effective and worthy of extension by agreement".
[92] Article 7, Annex V of the LOSC.
[93] Ibid, Article 8.
[94] TS Conciliation Report, para 284 and 304.
[95] Article 7, Annex V of the LOSC.
[96] TS Conciliation Report, para 69.

inappropriate for a conciliation commission to engage with the parties' legal views regarding the delimitation of maritime boundaries".[97] The Commission reached this conclusion based on the Conventions Articles 74 and 83, which in particular refer to international law in relation to delimitation of maritime boundaries and also on the requirement of the commission to record its conclusions on questions of fact or law.[98] Reflecting on the function of a conciliation commission, which is to facilitate reaching of an amicable settlement, and distinguishing such a function from the function of an arbitral or adjudicative body with powers to make binding rulings – whose function is pronounce on questions of international law – the Commission expressed the view that conciliation commissions need not, but may engage with the legal positions of the parties "to the extent that doing so will likely facilitate the achievement of an amicable settlement".[99] This view confirms that conciliation commissions are concerned more with bringing forward proposals and finding a common ground where parties can meet to reach of an amicable settlement rather than considering which parties legal position is more commendable under international law. After all, if parties desire such a pronouncement, international courts and tribunals are the appropriate fora.

Last but not least, Section 1, Annex V of the LOSC, consistent with the party autonomy accorded to states in general under the dispute settlement procedures in Part XV of the LOSC, accords the right to modify the conciliation procedure provided for in Annex V of the LOSC.[100] This means that if parties agree, they may modify any provision that has been discussed in this section.[101] This discretion is unsurprising also because, under Article 284 of the LOSC, states are entitled to use another conciliation procedure, if they agree.[102]

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[97] Ibid.
[98] Article 74 and 83 provides that: delimitation of maritime boundaries "shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution"; Article 7, Annex V of the LOSC.
[99] TS Conciliation Report, para 70.
[100] Article 10, Annex V of the LOSC.
[101] Yee (n 11) 321.
[102] Article 284 is discussed above.

3.2 Compulsory conciliation procedure

The procedure for compulsory conciliation, mandated in Section 3 of Part XV, is addressed in Section 2, Annex V of LOSC. Section 2 of Annex V covers the institution of proceedings[103], failure to reply or submit to conciliation[104], competence[105] and finally, article 14 of Section 2 incorporates the articles 2 to 10 of Section 1, Annex V, as mentioned just above.[106] To begin with the institution of compulsory conciliation proceedings, either one of the parties can do so by written notification to the other party to a dispute, which is subjected to compulsory conciliation.[107] As mentioned above, Timor-Leste instituted proceedings by written notification to Australia pursuant to article 298 and Annex V of the LOSC. Paragraph 2 of article 11 of Annex V obliges the respondent state to submit to conciliation – reiterating the compulsory character of the procedure under Section 2, Annex V of LOSC. While the procedure is compulsory, the Convention still anticipates the possibility of non-appearance by providing that failure to "reply… or submit to such proceedings shall not constitute a bar to the proceedings".[108] This provision has raised some concern: what purpose does progressing with conciliation serve where one of the disputing parties refuses to participate?[109] Though it may seem futile to proceed with conciliation when the respondent party does not submit to conciliation, because non-participation means that party is not invested in the procedure and would not be willing, as a result, to accept the recommendations, which are non-binding. However, the choice is logical in the overall context of dispute settlement procedures in the LOSC, and the disputes that may be subject of compulsory conciliation. A disputing state will only opt for compulsory conciliation because there is no other option, i.e., the other state has made a declaration exempting disputes relating to sea boundary delimitations from the purview of compulsory procedures provided for in the LOSC.[110] If non-appearance were to pose a bar to compulsory conciliation, such conciliation would not be 'compulsory' after all. While this may not be a satisfactory response to those concerns,

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[103] Article 11 Annex V of the LOSC.
[104] Ibid, Article 12.
[105] Article 13 Annex V of the LOSC.
[106] Ibid, Article 14.
[107] Annex V of the LOSC, Article 11; Disputes envisaged for compulsory conciliation are under Articles 297(2)(b), 3(b) and 298(1)(a) of the LOSC.
[108] Article 12 Annex V of the LOSC.
[109] Hamamoto (n 73) Article 13 Annex V, MN 3.
[110] Article 298(1)(a) of the LOSC.

it nevertheless explains why such a choice had to be made. Even if a party does not participate, the report and recommendations of a conciliation commission may still be revisited or may tried to be revisited, at a later time, when states restart negotiations given that inter-state relations are not static but rather dynamic and so is disputed maritime area governance. It may also be added that a party unwilling at first instance to submit to conciliation procedure may come to decide to 'give it a go' since the result is non-binding, thus, entailing no imposition to accept the outcome. For example, Australia initially objected to the competence of conciliation commission – but after the Commission rendered its decision on competence, legally binding on the parties[111], Australia decided to fully cooperate with the Commission.[112]

On this note, it is also worth reflecting on the provision in relation to competence in Section 2, Annex V. Article 13 of Annex V endows the section 2, Annex V commissions with *la compétence de la competence* – the power to decide questions regarding its competence to deal with a case.[113] It is only appropriate that a conciliation commission decides its own competence in the context of compulsory conciliation – it is a basic reflection of obligation to submit to conciliation rather than based on an agreement. The power to decide on its own competence is particularly important in this context because parties to the dispute may disagree on the interpretation of prerequisites and caveats under articles 281, 282, 283 and 298(1) of the LOSC as well as whether they are satisfied or not before a compulsory conciliation commission can proceed, as they did in Timor Sea Conciliation. Australia invoked article 281 as one of the grounds for arguing that the Conciliation Commission lacks competence.[114]

3.2.1 The prerequisites to compulsory conciliation under the LOSC

If certain conditions are met, states may have the opportunity to resort to compulsory conciliation for settling disputes concerning sea boundary delimitations. Compulsory conciliation becomes available to states where disputing state(s) make a reservation

[111] TS Conciliation Report, para 66.
[112] Timor Sea Conciliation, Decision on Competence; TS Conciliation Report, para 50. The report reflects that "Australia has come to see these proceedings as an opportunity to establish its partnership with Timor-Leste on a new footing. The achievement of agreement on maritime boundaries may provide a foundation for a strong and effective partnership for the future".
[113] Hamamoto (n 73) Annex V Article 14, MN 3.
[114] Timor Sea Conciliation Decision on Competence, para 51.

removing sea boundary delimitations from the purview of binding compulsory procedures, pursuant to the optional exception in article 298(1)(a) of the LOSC.[115] Exercising the right to make a declaration is subject to states accepting compulsory conciliation 'on the matter' – albeit subject to certain caveats. There are two sets of conditions that must be satisfied, namely, those under Section 1 of Part XV and those under article 298(1)(a)(i) of the LOSC.

States wishing to enable access to the binding procedures of Section 2 or the compulsory conciliation procedures provided in Section 3, both under 297 and 298 of the LOSC, must first meet the conditions provided for in Section 1, Part XV.[116] The first of these 'gate-keeping' provisions is article 281 of the LOSC, which provides that "the procedures provided for in this Part [refers to Part XV in general] apply only where no settlement has been reached by recourse to [peaceful means of their own choice] and the agreement between the parties does not exclude any further procedure".[117] In other words, the condition is that if there is an agreement between the parties excluding further procedures in relation to the settlement of the dispute, that agreement bars procedures under Part XV, including compulsory conciliation.[118] Pursuant to article 282 of the LOSC, if parties have agreed that a dispute concerning the LOSC shall be, at the request of any of the parties, submitted to a procedure entailing binding decision pursuant to "a general, regional or bilateral agreement or otherwise" such procedures shall apply "in lieu of the procedures" provided for in Part XV of the LOSC.[119] Finally, article 283, which has been addressed by this thesis previously, provides that when a dispute arises concerning the LOSC, the parties "shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means".[120] This provision precludes access to Part XV compulsory procedures if parties have not exchanged views regarding the settlement of the dispute.[121]

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[115] Article 298(1)(a)(i) of the LOSC.
[116] Timor Sea Conciliation Decision on Competence, para 46.
[117] Article 281 of the LOSC.
[118] Article 281 was considered as a possible basis for bar to the jurisdiction of courts and tribunals acting under Part XV in cases of *Southern Bluefin Tuna* (Provisional Measures) paras 56-60; *South China Sea Arbitration Award on Jurisdiction and Admissibility*, paras. 193-291.
[119] Article 282 of the LOSC.
[120] Article 283 of the LOSC.
[121] *South China Sea Arbitration Award on Jurisdiction and Admissibility*, paras 192 and 343.

In addition to the 'gate-keeping' provisions of section 1, article 298(1)(a)(i) of the LOSC places further preconditions to be met before a dispute may be submitted to compulsory conciliation. First, if a dispute relating to sea boundary delimitations arises "subsequent to the entry into force of this Convention" which parties cannot settle "within a reasonable period of time" through negotiations, state making such declaration "shall accept submission of the matter to [compulsory] conciliation" at the request of either of the parties to the dispute.[122]

Disputes concerning sea boundary delimitations which predate the entry into force of the Convention, i.e. 16 November 1994, compulsory conciliation option is not available to states.[123] This interpretation has been contentious for quite some time.[124] Prior to the Decision on Competence of Timor Sea Conciliation Commission, this wording was interpreted as entry into force of the Convention "between the parties to the dispute"[125] and given this decision it is argued that "the non-retroactivity of treaties that would normally have operated was seemingly over-ridden in light of the perceived plain meaning of the phrase".[126] It is general international practice to maintain a "distinction between the initial entry into force of the Convention as such, and its entry into force for States expressing their consent to be bound subsequently".[127] While these criticisms of the Timor Sea Conciliation Commission's interpretation of the meaning of 'the entry into force of the Convention' are valid, that interpretation is a reflection of the Convention's purpose of facilitating peaceful settlement of disputes. One may also point out that the drafters did not set the condition as being 'entry into force between the parties to a dispute' but simply as the entry into force of the Convention. Given that the Convention, at various points, refer to entry into force of the Convention, as such, but also refers to, in Annex II dedicated the Commission on the Limits of the Continental Shelf, 'entry into force of the Convention for that State' suggests that it is important to attach some value to the choice of the drafters.[128]

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[122] Article 298(1)(a)(i) of the LOSC.
[123] Timor Sea Conciliation Decision on Competence, para 76; Serdy (n 12) Article 298 MN 12.
[124] Serdy (n 12) Article 298 MN 12.
[125] Klein (n 8) 258.
[126] Klein (n 18) 117.
[127] Christian Tams, Article 308 MN 8 in Alexander Proelss, *UNCLOS: A Commentary* (Beck, Hart, and Nomos, 2017).
[128] Article 4 of the Annex II of the LOSC.

The requirement of passing of a reasonable period of time before submission to compulsory conciliation is vague but would probably be easily satisfied and would not bar proceedings unless maybe less than a year passed since parties have started negotiations – this can be supported by the interpretation in the Timor Sea Conciliation. The Timor Sea Conciliation Commission dates the dispute between the parties back to 2002, nothing that the dispute has been subject of negotiations in 2003 and 2006 which lead to the signing of CMATS – which deals with provisional arrangements pursuant to 74(3) and 83(3) of the LOSC.[129] Commission continues that even if the dispute were considered to have arisen in 2013, the year which the Convention entered into force for the parties[130], Timor-Leste has sought to engage in negotiations with Australia over permanent maritime boundaries since that date, particularly during September 2014 and March 2015.[131] The Commission was convinced that whether one considers that the dispute dates back to 2002 or 2013, the requirement of passing of reasonable time was satisfied when Timor-Leste initiated proceedings in April 2016.

Second, a further caveat is that the dispute does not involve "the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory".[132] In other words, this provision excludes disputes involving issues of sovereignty from submission to compulsory conciliation. These caveats for the applicability of compulsory conciliation in relation to disputes concerning sea boundary delimitations mean that some of the pending disputes over maritime areas does not fall within these boundaries of eligibility for submission to compulsory conciliation.

If compulsory conciliation is not available to parties because above discussed preconditions are not satisfied, parties may enter into a special agreement and voluntarily proceed to conciliation, provided for under article 284 of the LOSC.

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[129] Timor Sea Conciliation Decision on Competence, para 80.
[130] Timor-Leste acceded on 8 January 2013, and Australia ratified the treaty 5 October 1994, Information is publicly available at: http://treaties.un.org.
[131] Ibid.
[132] Article 298(1)(a)(i) of the LOSC.

Provided that parties agree, conciliation commission can consider disputes involving concurrent issues of sovereignty and disputes arising prior to the LOSC, so long as the dispute can be construed as one concerning the interpretation or application of the Convention.

4 Conciliation and the management of disputed maritime areas

Following the consideration of the procedure provided for both voluntary and compulsory conciliation under Annex V of the LOSC, this section aims to illustrate the role that conciliation has in the process of disputed maritime area management. In doing so, this section considers the question of scope of a conciliation commission's competence, and in this connection, the kind of disputes that may be conciliated. First this section will consider the issue of competence both in the context of voluntary and compulsory conciliation. Second, this section will explore disputes that can be conciliated concerning the management of disputed maritime areas.

According to article 284 of the LOSC a party to "a dispute concerning the interpretation or application of this Convention" can invite the other party to submit "the dispute" to voluntary conciliation.[133] This provision gives discretion to states to agree on 'the dispute' to be submitted to a conciliation commission. Given this discretion, disputes or disagreements over how to manage disputed maritime areas can be submitted to conciliation. This may include their disagreements over each of their preferred type of arrangement. In the context of voluntary conciliation, the competence of the conciliation commission is not as controversial as it may be in the context of compulsory conciliation.

In relation to compulsory conciliation, article 298(1)(a)(i) provides that, "a State having made such a declaration [removing disputes concerning articles 15, 74 and 83 relating to sea boundary delimitations] shall…at the request of any party to the dispute, accept submission *of the matter* to [compulsory] conciliation".[134] Further, disputes are submitted by written notification.[135] Given the lack of explicit provision dealing with the

[133] Article 284 of the LOSC.
[134] Article 298(1)(a)(i) of the LOSC [emphasis added].
[135] Article 1 and 11 of Annex V of the LOSC.

scope of a conciliation commission's mandate in relation to the subject matter and the disagreement on this matter in the Timor Sea Conciliation, it is worth discussing this issue. More importantly, this discussion is important for this chapter as it concerns whether a compulsory conciliation commission may deal with provisional arrangements and hence management of disputed maritime areas. At this point, it is important to remember the discussion in section 2.1.3 of Chapter VI. It was argued that the scope of the conciliation commission's competence is a different matter to the scope of the exemption from compulsory and binding procedures pursuant to article 298(1)(a)(i) of the LOSC.

One of Australia's objections that arose during the hearings, as discussed in Chapter VI[136], was that the issues Timor-Leste requested help with, in its opening statement, are outside of the Commission's mandate, established by the Timor-Leste's notification commencing the proceedings.[137] Two questions arise in this connection (a) whether conciliation commissions are restricted to considering the dispute directly referred to it by the written notification form states? (b) Should conciliation commissions be able to deal with other issues which may not be directly or explicitly found in the notification of the state?

While not providing an explanation as to the reasons for its conclusion, in its decision on competence, the conciliation commission addressed the first question. Obviously, this is related to its power to decide its own competence.[138] The Conciliation Commission considered that notification instituting the conciliation does not strictly define the scope of its mandate.[139] In terms of the second question, a reflection on the purposes of conciliation offers convincing answers.

The purpose of conciliation is to offer recommendations that can bring about an amicable settlement of the dispute between the parties.[140] In this connection, a

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[136] See section 2.1.3.
[137] TS Conciliation Decision on Competence, para 94.
[138] See section 3.2 above.
[139] Ibid, para 98, according to the Commission: "[e]ven if the notification were considered to strictly define the matters that could be discussed in the course of conciliation—a position that the Commission doubts".
[140] Article 6, Annex V of the LOSC.

conciliation commission should be able to consider and make recommendations on any issue that is necessary to bring about the resolution of the dispute.[141] In its report, the Timor Sea Conciliation Commission acknowledged that flexibility of article 5 of Annex V, empowering the commission to recommend "any measures" to facilitate an amicable settlement, is "emblematic of the flexible pragmatism that lies at the heart of the conciliation".[142] In other words, it is inherent in the conciliation process that a commission may need to deal with broader issues, or rather issues outside of the mandate set by the parties, as may be necessary for the exercise of its function to assist parties in resolving their dispute. Moreover, Gao observes that "the scope of the competence of a Commission is defined by the term 'the matter' in Article 298(1)(a)(i)" and may include both delimitation and issues of provisional arrangements.[143]

In its own reflection on the proceedings, the Timor Sea Conciliation Commission reiterates that the extension of its mandate to broader issues was essential for an amicable settlement. While the decision on competence clarified that the mandate was not strictly defined by the notification, the report, especially the section on the reflections of the Commission[144], demonstrates the sensitivity of the Commission to ensuring that the parties agreed on the matters/issues that were relevant to the resolution of the dispute, i.e., agreement on a maritime boundary.[145] Of course, such sensitivity is understandable because it did not want to lose one or both of the parties because, at the end, its recommendations are non-binding and the parties have to have or feel, a sense of ownership over the recommendations. It is only if the recommendations resonate with the parties that the conciliation commission can eventually succeed in achieving their purpose – an agreement.

As such, the scope of conciliation commissions' mandate should be interpreted broadly enough, but not unnecessarily, to enable them to provide assistance to the parties to the extent necessary for an amicable settlement. This brings us to the reason

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[141] Ibid, Article 5; TS Conciliation Report, para 62.
[142] TS Conciliation Report, para 62.
[143] Jianjun Gao, 'The Timor Sea Conciliation (Timor-Leste v. Australia): A Note on the Commission's Decision on Competence' (2018) 49 *Ocean Development & International Law* 208, 220.
[144] TS Conciliation Report, Section VII. The Commissions Reflections on the Proceedings, at p. 84. In this section the Commission recorded "some of the key elements that, in its view, contributed to the outcome of these proceedings", para 283.
[145] Ibid, para 292.

why compulsory conciliation is relevant to this thesis. Where conciliation seems unlikely to produce an agreement on the maritime boundary, a conciliation commission should be able to deal with and offer recommendations on managing disputed maritime areas, i.e., provisional arrangements. Conciliation commissions should not be prevented, in light of the objective of conciliation to improve relations and contribute to peaceful settlement of disputes, from offering assistance with provisional arrangements. Furthermore, if conciliation commission can facilitate an agreement on provisional arrangements, that kind of cooperation may lay the groundwork for, by improving diplomatic relations, an agreement on maritime boundary, or for states to decide to make the provisional arrangement, such as a joint management regime, permanent, because it is better suited than an artificial maritime boundary. The principles elaborated in Chapter II would also suggest the broader reading of the mandate of the commission.

Overall, since a conciliation commission's task is to facilitate an amicable settlement, it is desirable that commissions deal with 'the matter' broadly, rather than narrowly. Therefore, as the Timor Sea Conciliation Commission did, other conciliation commissions should be able to deal with matters that may arise incidentally to their mandates of settling the maritime boundary, such as considering confidence-building measures[146], or creation of a joint management regime for resource governance.[147]

As mentioned earlier in this chapter, not all disputes may be suitable or appropriate to be conciliated and as such it is important to acknowledge the limitations of conciliation in this regard. For example, if one or both of the parties are more interested in resolving a dispute concerning whether certain act or activities are in breach of obligations not to jeopardise or hamper under articles 74(3) and 83(3) of the LOSC, such disputes as they are purely legal questions, and particularly backward looking, would not be appropriate for conciliation and can be regarded as a limitation of conciliation in relation to disputes over maritime areas. Since conciliation is focused on bringing

[146] In this case this included, mutual agreement on termination of an existing provisional arrangement between the parties, see Trilateral Joint Statement of 9 January 2017, available online at PCA website: https://pcacases.com/web/sendAttach/2049

[147] The issue of resources in Greater Sunrise area arose incidentally, as the Commission did not see an agreement on maritime boundary being concluded without shared control over Greater Sunrise, see TS Conciliation Report, para 241.

parties to an agreement, in other words, forward focused, aiming to identify common ground, conciliation can more usefully produce a *modus operadi* for the disputed maritime area.

As such, states may find it useful to conciliate provisional arrangements. A few different options can be considered. First, states may resort to conciliation due to failure of bilateral negotiations to reach an agreement over how to manage disputed maritime areas. In other words, here the parties may ask the conciliation commission to provide recommendations for, or propose, potential arrangements for states in relation to the disputed maritime area, pending final settlement. Second, a conciliation commission may also consider disputes over the implementation of provisional arrangement that states have entered into. In this regard, it is worth considering an empirical example where this type of conciliation may prove useful.

The Japan-Korea joint development zone (JDZ) Agreement is hailed as successful model that diffuses tensions between the parties over their disputed maritime areas.[148] That being said, there is obvious conflict brewing between the parties, as Japan holds the view that there is no commercially exploitable oil, which resulted in the halt of operations in the early 2000s, while Korea has been wishing to resume exploration in the JDZ despite Japanese scepticisms.[149] Choi argues that Korea has a few options in the face of the non-implementation of the JDZ Agreement as a result of disagreements over the existence of natural resources, which are, unilateral exploration and exploitation, in accordance with the JDZ Agreement or its potential suspension, either full or in part.[150] However, before resorting to such unilateral options, in view of the principles of governance discussed in Chapter II, a first route to consider should be trying to engage with Japan on points of disagreement or dispute in relation to the Agreement, and follow the dispute resolution provisions of the Agreement itself. According to Article 26 of the JDZ Agreement, disputes concerning

[148] Seokwoo Lee 'Experiences in Dealing with Maritime Disputes' (2016) 4 *The Korean Journal of International and Comparative Law* 85, 97.
[149] Jee-hyun Choi, 'Korea–Japan JDZ to End in Deadlock?: The Potential for Unilateral Korean Exploration and Exploitation' (2020) 51 *Ocean Development & International Law*, 162.
[150] Ibid, 165-166 and 166-169.

interpretation and implementation “shall be settled, first of all, through diplomatic channels”.[151]

It may be argued that the language of the provision does not exclude other methods of dispute settlement, it does, however, identify an initial preference for diplomatic processes. If negotiations fail, parties have the discretion to reach an agreement pursuant to article 284 of the LOSC, to conciliate this dispute about their provisional arrangement concerning articles 74(3) and 83(3) of the LOSC. It is exactly these kinds of disputes that conciliation holds great potential, in light of its advantages discussed in this chapter[152], where parties can compromise and reach an agreement based on the recommendations of the commission on how to move forward. With that being said, there are important limitations of conciliation as a dispute settlement procedure as discussed above and may not be a suitable option if parties are not ready to compromise. It is especially important to note that if Australia’s initial resistance to conciliation remained throughout the process, it is likely that the process would not have been successful. This highlights an important limitation in the compulsory conciliation process especially when one of the parties is brought to the process involuntarily – reducing the chance of a favourable outcome.

5 Concluding thoughts on prospects

One of the options that the ‘general provisions’ in Section 1, Part XV of the LOSC envisage for ‘peaceful settlement of disputes’ is conciliation.[153] The Timor Sea Conciliation paved the way for thinking more generally about the potential of conciliation as a procedure for other disputes both concerning delimitation and also beyond the delimitation context. The advantages of conciliation considered in this chapter illustrate why conciliation may be a worth-while option for disputing states in relation to disputed maritime areas and made a case for its utilisation as this process have the potential to aid states in ‘getting along’ in disputed maritime areas.

[151] Japan-Korea JDZ Agreement, Article 26(1).
[152] See Section 2 above.
[153] Articles 279 and 284 of the LOSC.

Conciliation offers disputing states a procedure that is similar to mediation and negotiation, but with structure. Importantly, conciliation is flexible, both in relation to the procedure and the matter. Even in difficult cases, such as with Timor-Leste and Australia, the flexibility of the procedure means that conciliation commission may find common ground by setting aside incompatible legal interests and positions of the parties, by considering a variety of factors, including non-legal considerations, for example economic or environmental factors. This is the hallmark advantage of conciliation compared to adjudication. Last but not least, conciliation generally involves a degree of privacy, depending on the choice of the parties, meaning that sensitive issues can be handled without fear of outside pressure. States can also agree that positions taken, proposals offered during the conciliation procedure are without prejudice to their legal position in case the procedure fails to bear fruit. Therefore, conciliation is a relatively risk-free endeavour for disputing states to consider. They may find an agreeable proposal, which may include delimitation of the maritime boundary, or a *modus operandi*, for disputed maritime areas. Consistent with the aim of this thesis to consider the broader context within in which disputed maritime areas are situated, rather than focusing solely on legal matters, this chapter illustrates that conciliation has a role to play in the process of disputed maritime area management. However, this chapter also acknowledges that conciliation as a dispute settlement method is not without its limitations. A positive outcome in a conciliation is not a given, this limitation is apparent in the reflection of the Timor Sea Conciliation Commission reflects when it acknowledged that the parties "ultimately preferred an amicable solution to the continuation of an unsatisfactory status quo" and as such, "the matter can be considered to have been ripe for resolution". Success of any future conciliation in relation to disputed maritime areas will very much depend on the maturity stage of the dispute and the relations between disputing states.

Chapter VIII: Conclusion

This thesis has addressed the 'governance' of disputed maritime areas. As illustrated in the Introduction, disputed maritime areas are problematic for a number of reasons, raising significant maritime security challenges for states. Perhaps the most apparent of these being the exercise of coastal state rights and jurisdiction in a maritime area claimed by another state – and associated challenges. Despite challenges of such unresolved disputes over maritime areas, states find it extremely difficult because of disagreements over applicable legal rules or 'unwelcome' consequences of some legal rules, and relations between the states in dispute as well as domestic politics, to reach an agreement on boundaries. Reaching agreements on maritime boundaries is an observable problem that can last decades or more, and sometimes there are simply no prospects. There are many 'alternative perspectives' on disputed maritime areas as acknowledge in the Introduction. Given that dynamics and nature of each disputed maritime area are unique and distinct, there is scope to explore different perspectives on how to live with them. It was this underlying assumption that motivated and created the launch pad for this thesis.

The aim of this thesis was to address the following question: what is the normative and institutional framework for managing disputed maritime areas? This thesis has addressed this question by utilising the conceptual framework of 'governance', influenced by the ocean governance literature. The concept of governance is made up of three pillars: principles, rules, and institutions. This framework has facilitated making of the argument that management of disputed maritime areas is a process whereby three pillars of governance are in interaction. The thesis first considered 'principles' that are applicable to and should guide coastal states in their decisions relating to the management of disputed maritime areas. The thesis considered some of the often-discussed issues of provisional arrangements and their absence, in other words unilateralism and bilateralism in disputed maritime areas. In addition, this thesis considered the broader institutional framework that can be seized, namely multilateral governance through regional bodies and dispute settlement mechanisms. This thesis concludes that there are multiple processes that aid states in getting along in disputed maritime areas. This thesis has also underlined the temporal elements involved in the

process of disputed maritime area governance, such as change and development in social, political, economic, and environmental conditions. In fact, changing circumstances surrounding disputed maritime areas over time will necessitate adoption of different approaches. While states may agree on a provisional arrangement concerning fisheries management, half a decade later changes in political and economic circumstances may lead the parties to deepen and expand their arrangement into other areas, such as environmental protection or renewable energy generation. Such dynamics are also observed in relation to cooperation of states through regional institutions, as discussed in Chapter V. Chapter VII showed that positive progress in the political relationship coupled with economic factors brought about agreement on the competence of conciliation commission and eventually the Timor-Leste and Australia reached an agreement on maritime boundaries. It has been made clear that in different phases of the dispute, different principles and processes are involved in the governance of disputed maritime areas.

The central argument and main original contribution of this thesis is that disputed maritime areas are situated in a broader normative and institutional framework. This thesis demonstrates 'governance' of disputed maritime areas is a process whereby multiple but not mutually exclusive, in fact, complimentary, frameworks assist states in getting along and managing disputed maritime areas. Furthermore, the discussion of these frameworks has illustrated that disputed maritime areas concern not only the rights and interests of the disputing coastal states but that there are broader interests involved, namely the protection and preservation of the marine environment and its resources – concerns of the international community – and as such, 'governance' of disputed maritime areas is not always a matter for two states alone.

The thesis starts by considering two options, one of which is provided for explicitly by the LOSC, namely, provisional arrangements, and the other, resorted often in the absence of provisional arrangements by many states, unilateralism. Chapter IV tackles unilateralism, a phenomenon that is widespread in disputed maritime areas. After considering some doctrinal questions regarding limitations posed by the LOSC on unilateralism in different maritime zones, this chapter argues that unilateral management of disputed maritime areas is undesirable from a governance

perspective for several reasons. First, unilateralism is contrary to several principles of governance discussed in Chapter II. Second, from a policy perspective it is undesirable because there may be a tendency to disregard the rights and interests of others in the decision and decision-making process. From the perspective of the other claimant, unilateral exercises of coastal state competencies are likely to be disregarded or purposely breached, because of problems associated with acquiescence and as such is likely to lead to ineffectiveness in relation to protection and preservation of the marine environment and management of natural resources. In the circumstances of unlawful unilateral action, the governance approach developed in this thesis suggest that the other party should resort to avenues of peaceful settlement of disputes, such as third-party dispute settlement.

By entering into a provisional arrangement, states can cooperatively manage their disputed maritime areas. This thesis has discussed some of the examples of provisional arrangements that states have entered into in practice to illustrate the degree of discretion that states have when entering into such arrangements. As discussed in Chapter VII disagreements over what arrangements should look like can be conciliated. Conciliation aids states in deciding how to frame their discretion, thereby contributing to the process of disputed maritime area governance. However, conciliation has its limitations, such as the non-binding nature of the result and unavailability of compulsory conciliation for certain disputes. Similarly, provisional arrangements cannot address all issues. Moreover, as shown by this thesis neither states should necessarily have to address all decisions at the bilateral level. Given the transboundary nature of issues surrounding the ocean and its resources cooperation at bilateral level can be complemented by agreement at the multilateral level.

The examples of regional cooperation surveyed in Chapter V in this chapter demonstrate that such institutions contribute to the management of the dispute between states in various ways, while at the same time, offering more effective management in relation to the common concerns, i.e., protection of marine environment and conservation and management of living resources. Regional institutions can help diffuse tensions between disputing states as the question is transformed from the bilateral sphere to the multilateral sphere where regional

standards are established with participation of all states concerned. Over time, since participation in these institutions are of a technical and scientific nature politics between states are 'diffused' or at the least, states come up with ways in which to ensure constructive cooperation continues. This chapter does not only improve our understanding of the role that multilateral institutions have to play in relation to disputed maritime areas, but also improve our understanding of challenges posed by disputed maritime areas that exist within an institution's area of competence. Identification of the challenges posed is the first step in addressing and offering ways forward.

Since settlement of disputes forms an important part of the normative framework, the final two chapters of the thesis deals with dispute settlement mechanisms and how these processes contribute to the management of disputed maritime areas. Chapter VI examines how judicial institutions contribute to the management of disputed maritime areas. This thesis argues that disputes concerning articles 74(3) and 83(3) of the LOSC are not within the scope of the allowed optional exception under Article 298(1)(a)(i) of the LOSC. It argues that disputes concerning obligations of states in disputed maritime areas may be submitted to compulsory and binding procedures under the dispute settlement system of the LOSC. Moreover, special emphasis is placed on the provisional measures proceedings that are available before international courts and tribunals. The chapter illustrates that both the proceedings themselves but also the ways in which provisional measures may be crafted by courts and tribunals can aid states in managing their disputed maritime areas. Importantly, courts and tribunals with competence under the LOSC are not only bound by the rights and interests of the parties to a dispute when deciding what provisional measures to order, but have the power to consider broader interests, i.e., protection and preservation of the marine environment.

Finally, the thesis considered a non-judicial dispute settlement procedure as an alternative to binding dispute settlement. Various characteristics of conciliation, such as the general flexibility, confidentiality and non-binding nature of the procedure makes conciliation a very attractive and in fact suitable option for certain kinds of disputes. Disputed maritime areas and those that involve concurrent issues of land sovereignty

are kinds of disputes that are suitable for conciliation. However, purely legal questions concerning disputed maritime areas such as whether a certain act has breached the obligations under articles 74(3) and 83(3) of the LOSC would not be suitable for conciliation because the *raison d'etre* of conciliation is to bring parties to agreement on a matter and answering to such a legal question does not bring parties to an agreement. Rather, states would find it more useful to conciliate a *modus operandi* or possible provisional arrangements for disputed maritime areas.

This thesis contributes to both doctrinal debates surrounding disputed maritime areas, especially in relation to interpretation and application of articles 74(3) and 83(3) of the LOSC, but also in relation to whether such disputes fall outside the scope of compulsory and binding procedures pursuant to a declaration under article 298(1)(a)(i) of the LOSC. While there are such contributions throughout this thesis, the overall value of this thesis is that brings to attention the broader context and frameworks that disputed maritime areas are a part of. One of the aims of this thesis was to move away from purely legal examination of legality or illegality of certain activities based on bilateral legal obligations that exist between disputing coastal states and divert the focus of both states and the literature on the topic from 'exercise of rights' such as resource exploitation in disputed maritime areas to 'obligations' of states, i.e., protection and preservation of the marine environment and conservation and management of natural resources. Focusing on obligations was valuable and important for this thesis to bring out the idea that there are broader interests involved in disputed maritime areas. Finally, the governance approach taken here is an important addition to literature on disputed maritime areas because it facilitates reflecting on the broader context that disputed maritime areas operate and exploring the ways in which different processes interact in managing disputed maritime areas.

Given the existence of a significant number of disputed maritime areas and a significant number of arrangements that are in deadlock in disputed maritime areas, the issues discussed in this thesis are important and timely and they will continue to be for the foreseeable future. This thesis desires to get the idea through that disputed maritime areas need not be a curse, in light of the broader normative and institutional

framework discussed in this thesis, but that they can be managed in various ways, and especially a conciliatory and cooperative approach can benefit all states involved.

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